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U.S. Department of Justice

FEDERAL ANTI-TRUST DECISIONS

CASES DECIDED IN UNITED STATES COURTS

ARISING UNDER, INVOLVING, OR GROWING
OUT OF THE ENFORCEMENT OF

THE ANTI-TRUST ACT OF JULY 2, 1890
(26 STAT., 209)

INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS
NOT BASED UPON THAT ACT

1890-1912

COMPILED BY

JAMES A. FINCH

UNDER THE DIRECTION OF THE ATTORNEY GENERAL

IN FOUR VOLUMES

VOL. 1

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WASHINGTON
GOVERNMENT PRINTING OFFICE
1912

C

SENATE OF THE UNITED STATES,

May 17, 1911.

Resolved by the Senate (the House of Representatives concurring), That there be printed and bound three thousand copies of the Federal Anti-Trust Decisions, eighteen hundred and ninety to nineteen hundred and eleven, to be compiled by the direction of the Department of Justice, one thousand copies for the use of the Senate and two thousand copies for the use of the House of Representatives.

Attest:

CHARLES G. BENNETT, *Secretary,*
By HENRY H. GILFRY, *Chief Clerk.*

Attest:

SOUTH TRIMBLE, *Clerk.*

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FEDERAL ANTI-TRUST DECISIONS.

VOL. 1
1890-1899.

[898] UNITED STATES *v.* JELICO MOUNTAIN COKE & COAL CO. ET AL.^a

(Circuit Court, M. D. Tennessee. October 13, 1890.)

[43 Fed., 898.]

PRELIMINARY INJUNCTIONS—ILLEGAL COMBINATIONS.—Where the material allegations of a bill filed by the United States against various coal companies, under Act Cong. July 2, 1890, to enjoin their combination in restraint of trade, are denied by defendants' affidavits, a preliminary injunction will not be granted, as plaintiff gives no indemnifying bond in case the injunction should be dissolved.^b

In Equity.

This case arose on a bill filed by the United States under the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." All the coal companies doing business in the city of Nashville, as members of the coal exchange, were made parties defendant. On the preliminary hearing a temporary injunction was refused.

W. H. H. Miller, Atty. Gen., *Wm. H. Taft*, Acting Atty. Gen., and *John Ruhm*, U. S. Atty.

^a See also page 9 (46 Fed., 432).

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Syllabus.

G. N. Tillman and W. L. Granbery, for defendants.

HAMMOND, J.

This is an application for a preliminary injunction only, and it appears to the court better to await the hearing, and determine upon plenary proof of the exact facts those grave questions which have been suggested, than to decide them now upon the bare statements of the bill which are so general in their character, and quite too barren of any averments of specific facts to enable the court to determine whether the general conclusions of fact averred are true, particularly in view of the affidavits of defendants denying some of the most important of them; and in this view it is unnecessary to hear any counter-affidavits. The court is the more inclined to this course since the bill is not that of a private citizen, complaining of an injury to him, but only by the United States [899] on behalf of the public, and in pursuance of a public policy of enforcing a recent act of congress to prevent combinations in restraint of trade and commerce. It is manifest that the act is new, and this a most important application of it. It would more injure the defendants to grant this preliminary injunction if, on the hearing, it should turn out that the case does not fall within the act, than it would injure the public to withhold the injunction until the final hearing; and the more since the United States gives no bond to protect the defendants against that injury, as a private suitor would be compelled to do. When this is the situation of the parties the rule is to refuse the preliminary injunction, and abide the hearing. The court reserves all expression of opinion on the subject-matter of the bill until that time, as the best for all concerned.

**[721] AMERICAN BISCUIT & MANUF'G CO. v.
KLOTZ ET AL.**

(Circuit Court, E. D. Louisiana. January 8, 1891.)

[44 Fed., 721.]

RECEIVERS—COMBINATIONS TO RESTRAIN TRADE—Defendant and his partner sold their bakery business to complainant corporation, receiving payment in its stock, and defendant leased to it the prem-

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ises where the business was conducted, and contracted to carry it on as the purchaser's agent, for a salary. After operating under this arrangement for a time, he repudiated the sale, resumed possession under the old firm name, and refused to account to complainant. The bill was brought to enjoin him from asserting a hostile claim, for an accounting, and a receiver. Defendant, and his partner as intervenor, filed a cross-bill for rescission of the sale for fraudulent representations, and tendered back the stock. Complainant was practically a "trust," organized to monopolize the business, and had already secured control of 35 leading bakeries in 12 different states. *Held* that, while a case was made for a receiver, pending litigation between ordinary parties, the prayer would be denied, as equity would not encourage a combination in restraint of trade, and probably illegal, under Act Cong. July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," and Act La. July 5, 1890, for the same purpose.*

In Equity.

T. J. Semmes and Bayne, Denegre & Bayne, for complainant.

W. S. Benedict and Rouse & Grant, for defendants.

Before PARDEE and BILLINGS, JJ.

PER CURIAM. This cause is submitted upon an application for a receiver. Some time in May last, the defendant Klotz, and Fitzpatrick, his partner, composing the firm of B. Klotz & Co., sold to the complainant their biscuit and confectionery manufactory for the price of \$259,000, and an assumption of the debts of B. Klotz & Co., amounting to \$42,000, which it was understood and agreed should be paid out of the income from the future business. The visible property was estimated to be of the value of \$101,000, and the good-will of the business to be of the value of \$200,000. The price was paid in stock of the complainant's corporation, estimated to be of value at par; that is, to be worth [722] 100 cents on the face value. The purchase was completed, price paid, property delivered, the factory and good-will transferred by Klotz & Co. to the complainant. Klotz leased his bakery premises to complainant for the term of years, and contracted in writing to become, and did become, the agent of the complainant, at a salary of \$—— per year. Klotz continued to carry on the business as agent for the complain-

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ant down to some time in November, when he repudiated the sale and the lease, erased the name of complainant from the bakery, as agent, transferred the policies of insurance from the complainant to himself, as an individual, then to B. Klotz & Co., and, for and in the name of the late firm, resumed the possession of all the property he had sold to the complainant, and the conduct of the business of the bakery and the confectionery establishment. He did this without resort to any legal proceedings. He thereafter held possession adversely to the complainant, and excluded it from the bakery. In this state of things, the complainant filed its bill for an injunction, and for an account and for a receiver, against Klotz and W. A. Schall, who was alleged to be co-operating with him in the possession adverse to the complainant. Klotz has filed an answer, and he, together with his former partner, Fitzpatrick, who intervened by petition *pro interesse suo*, have filed a cross-bill asking a rescission of the entire transaction, *i. e.*, the sale and the lease, and tendering the stock which had been received by them as the consideration of the sale. Numerous exhibits and affidavits have been adduced by each party upon this hearing. The recital thus given shows that, in an order inverted from what would be expected, we have before us a cause in which a party who has sold and delivered a business to another, and become his agent, and, as such agent, was in possession of the property sold, sets up a possession adverse to his principal, asks for a cancellation of the sale, and the purchaser and principal asks that the agent shall account, shall be enjoined from asserting any claim hostile to his principal,—in a word, for a confirmation of its rights under the purchase.

The immediate question before us is, what disposition shall be made of the *res*, the business of the bakery and manufactory, pending this contest? The vendor and agent asks that he be allowed to remain in adverse possession. The purchaser and principal asks for a receiver. It is clear that, as to this provisional disposition of the *res*, the defendant Klotz cannot be allowed to gain anything by his ouster of his vendee and principal. He must stand with those equities, and none other, which existed before the ouster. The case as to the

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appointment of a receiver must be reviewed and determined as if he (Klotz) had filed his bill averring possession as agent, which he asked to have changed by a decree into a possession as owner, through the cancellation of the sale and the lease; that is, he must aver a legal title in the American Biscuit & Manufacturing Company, which he seeks to have avoided and annulled. If, as in this case, he seeks to do all this by reason of fraud, and he establishes the fraud, a court of equity will not refuse to hear him. He would not be estopped, for fraud vitiates and sets aside even estoppels. *Herm. Estop.* par. 22, p. 244; *Pendleton v. Richey*, 32 Pa. [723] St. 58, 63. But, while he is not estopped from proceeding to set aside the sale and the lease by reason of his agency and his obligations as trustee, he comes into court assailing and seeking to cancel a legal title; for until that is done his possession is that of the complainant. Under these circumstances, until the hearing, the practice in the courts of chancery is not to disturb the possession under the legal title prior to the final decree, unless a case of monstrous wrong is established. *Stilwell v. Wilkens*, Jac. 280, reported in full in *Edwards on Receivers*, p. 28, Lord ELDON, when a similar question was presented, observed:

"The point that struck me was whether, on a bill to impeach a sale for fraud, the court interposes so strongly before the hearing as to take away the possession from persons holding it under the effect of deeds not yet set aside by decree."

And he holds that "it was not the general habit of the court." There the case was so monstrous, and the proof was so strong, that "it was hardly possible that the transaction could stand," and the legal title was interfered with.

This is a leading case, and gives what we find is the rule. The possession under the title is not disturbed unless the proof of fraud is so strong as to lead the court to the clear conviction that it will, on the final hearing, be established. The fraud set up and relied upon by the defendant and intervenor is false and fraudulent representations by the agents of the complainant in this: that they represented that the stock was fully paid-up stock, whereas, in truth and fact, it was none of it paid up in money, and only paid up in part, and, to the extent of that part, by transfer of plants or bakeries and manufactories at an estimated value as capital.

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The stock delivered to the defendant and intervenor was not paid up until it was issued to them, and was paid for by a transfer of the bakery and good-will; and then it became paid up, and they were discharged from all liability to be made to contribute as shareholders therefor. The testimony as to what was represented by complainant's agents about the stock being paid up is conflicting; but, when viewed in connection with the circumstances under which the stock was received, fails to satisfy us, upon this preliminary hearing, that any false representations are proved to have been made. The case of the defendant and intervenor, set up in their cross-bill, whereby they oppose the appointment of a receiver, is that of parties who seek to rescind a deed on the ground of fraud, which upon this hearing they fail to establish.

So far we have considered the question of appointing a receiver of the property in controversy *inter partes*, and mainly from the stand-point presented by the defendant's showing, and thereon such appointment seems proper, and we should accord it, but for an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties. We are not satisfied that the complainant's business is legitimate. While the nominal purpose of the complainant's corporation, as stated in its charter, is the manufacture and [724] sale of biscuit and confectionery, its real scope and purpose seems to be to combine and pool the large competing bakeries throughout the country into practically what is known and called a "trust," the effect of which is to partially, if not wholly, prevent competition, and enhance prices of necessary articles of food, and secure, if not a monopoly, a large control, of the supply and prices in leading articles of breadstuffs. The case shows that an insignificant number of shares of complainant's stock was unconditionally subscribed for, apparently enough to qualify directors; but the great mass was taken and held by irresponsible parties, to be used in parceling out as full-paid stock to such leading and successful bakeries throughout the country as could be induced to come in on an agreed

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value of the property and a large estimate of good-will. Each bakery when secured to be carried on by its former managers, subject, however, as to control of funds, territory, prices, and competition, to the central management; all profits pooled, and of course division thereof to be made on the basis of the stock assigned to each bakery. Under this arrangement complainant has already secured the control, and pooled the business, of 35 of the leading bakeries in 12 different states of the west and south, and is evidently seeking more constituents. The act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," expressly prohibits, under severe penalties, "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," and declares punishable "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the common trade or commerce among the several states." The enforcement of this act is, by the statute, devolved upon the circuit courts of the United States. The first and third sections of an act of the legislature of Louisiana, approved July 5, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies, and to provide penalties for the violation of this act," declare:

"Section 1. That every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, is hereby declared illegal."

"Sec. 3. That every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the limits of this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word "monopolize" cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean "to aggregate" or

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"concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law "combination in the form of trust" would seem to point to just what, in popular language, is meant by pooling.

Now it is to be observed that these statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc.; and, further, that the language is altogether silent as to what means must be used to constitute the offense. The offense is defined to "combine in the form of trust, or otherwise, in restraint of trade or commerce," and "to monopolize, or attempt to monopolize, any of the trade or commerce." To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense. One just and decisive test of the meaning of the expression "to monopolize" is obtained by getting at the evil which the law-maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force. If this is the meaning of the defining words, does not this corporation, thus glutted with the 35 industries of 12 states, disclose an "attempt to monopolize?" So far, therefore, as the complainant's business is a combination in restraint of trade, or is an "attempt to monopolize, or combine, in the form of a trust, or otherwise, any part of trade or commerce," as these words are properly defined, the law stamps it as unlawful, and the courts should not encourage it. Aside from this, the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a re-

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ceiver by a court of equity is not a matter of strict right, but of judicial discretion. *Fosdick v. Schall*, 99 U. S. 235. It falls within that class of interlocutory remedies which courts must grant or withhold, according to a discretion conscientiously exercised, upon a consideration of all the facts which a cause presents, involving the rights of the parties and the interests of the public. The attempt to accumulate in the hands of a single organization the business of supplying bread itself to so large a portion of the poor, as well as the rich, people of the United States should not be favored by a court of equity. It carries with it too much of danger of excluding healthy competition, thereby increasing the difficulty to the general public of participating in a most useful business, as well as adding to the possibility of multitudes of citizens being temporarily, at least, compelled to pay an arbitrary and high price for daily food.

Whatever we may feel compelled to do, on the final hearing of this cause, towards recognizing the complainant's legal rights, and compelling a faithless trustee to account, we are clear that at this preliminary stage, [726] with our present impressions of the character and general scope of complainant's business, the court ought not, by the appointment of a receiver, to aid complainant to perfect, and perhaps to enlarge, his combination or trust; and the refusal to appoint a receiver can result in no serious and lasting injury to complainant, because the shares of stock of complainant company, forming the entire consideration of complainant's purchase, have been tendered in court, and may be impounded, to be held as security for any damages susceptible of proof resulting from defendant's mismanagement of the property pending the suit. The motion for a receiver is denied.

[432] UNITED STATES v. JELlico MOUNTAIN
COAL & COKE CO. ET AL.*

(Circuit Court, M. D. Tennessee. June 4, 1891.)

[46 Fed., 432.]

CONSPIRACY—TRUST COMBINATION—INTERSTATE COMMERCE.—An agreement between coal mining companies operating chiefly in one state

* See also page 1 (48 Fed., 898).

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and dealers in coal in a city in another state, creating a coal exchange to advance the interests of the coal business, to treat all parties to the business in a fair and equitable manner, and to establish the price of coal, and change the same from time to time, by which it was agreed that the price of the coal at the mines should be 4½ cents, the freight being 4 cents, and the margin of the dealer should be 4½ cents, making the price to the consumer 13 cents, and that, whenever the price of the coal is advanced beyond an advance in freights, one-half the advance shall go to the mine owner, and the other half to the dealer, and a penalty was provided by fine, of any member selling coal at a less price than the price fixed by the exchange, and by which it was forbidden for owners or operators of mines to sell coal to any person other than members of the organization, and for dealers to purchase of miners who were not members, but exempting coal used for manufacturing and steamboat purposes from the prices prescribed until all the mines tributary to that market should come into the exchange, or until the exchange could control the prices of coal used by manufacturers, is within the language of Act Cong. July 2, 1890, declaring "every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," and also the monopolizing, or combination with another to monopolize, trade or commerce among the several states, a misdemeanor.*

In Equity. On bill for injunction.

John Ruhm, U. S. Atty., *Lee Brook*, Asst. Dist. Atty., and *James Trimble*, for the United States.

Tillman & Tillman, *Henderson & Jourolman*, and *Hill & Granberry*, for defendants.

[433] KEY, J.

The petition in this case is filed against the members of the Nashville Coal Exchange. The membership of the exchange is composed of various coal mining companies operating mines in Kentucky and Tennessee, chiefly in Kentucky, and of persons and firms dealing in coal at Nashville, Tenn. It is alleged that the purposes, objects, and agreement of the defendants are in violation of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the petition seeks to restrain and prevent the violations of the act by injunction under section 4 of the law. The first section

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of the act declares that "every contract or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is declared illegal." The second section declares that "every person who shall monopolize, or combine or conspire with another person or persons to monopolize, any part of the trade or commerce among the several states * * * shall be guilty of a misdemeanor." A violation of the first section is a misdemeanor also. By the fourth section jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain violations of the act, and it is made the duty of district attorneys in their respective districts, under the direction of the attorney general of the United States, to institute proceedings in equity to prevent and restrain such violations. The articles of agreement between the defendants provide, among other things, that the objects of this exchange are, "To do all in its power to advance the interests of the coal business at Nashville, to treat all parties to this agreement in a fair and equitable manner, and to establish prices on coal at Nashville, Tenn., and to change same from time to time, as occasion may require." Prices to consumers at Nashville are to be established so as to sell coal at a fair and reasonable price, so as to allow all parties a fair profit for their product. Every person, firm, or corporation owning or operating mines who ship coal to Nashville shall be eligible to membership in this exchange, and all coal dealers in the city of Nashville are also eligible to membership. None others are eligible. Any member of the exchange who may withdraw from it, and continue in the coal trade in Nashville, or ship any coal to Nashville, shall forfeit and relinquish all interest of any and every kind, however obtained or accrued. The exchange will from time to time establish prices at which coal shall be sold in Nashville. Coal classed as No. 1 shall be valued at the mines at 4½ cents minimum price for bushel of 80 pounds lump, and freight being 4 cents, the dealer's margin to be 4½ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mine; No. 3 at 6 cents; and when the above prices are advanced in excess of the advance in freights, then one-half the advance shall go to the mine owners and one-half to the dealers. Every member

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found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. A majority of all the members shall constitute a quorum for the transaction of business. Owners or operators of mines [434] shall not sell or ship coal to any person, firm, or corporation in Nashville, or West Nashville, or East Nashville, who are not members of the exchange, and dealers shall not buy coal from any one not members of the exchange. All coal used for manufacturing and steam-boat purposes shall be exempt from prices made by the exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers. No coal shall be sold in any month to be delivered in any following month except at prices fixed for the particular month in which coal so sold is to be delivered. Fines and penalties are declared, so as to enforce the stipulations embodied in the constitution and by-laws of the exchange.

It can hardly be denied that such provisions as these, by a body of persons such as compose this exchange, is a contract or combination in restraint of trade or commerce, or an attempt between different persons to monopolize a part of the trade or commerce, between parties who are citizens of or reside in different states. It is shown that several mining companies in Kentucky engaged in raising coal, and most of the coal dealers of Nashville, Tenn., have entered into the foregoing mentioned arrangement. It is insisted for the defendants that the subject of agreement is not interstate commerce; that the obligation as to the mining companies ends at the mines. The price is fixed and paid at that point, and consequently controversies in regard to the contract as to them belong exclusively to the courts of the state of Kentucky; that, so far as the dealers are concerned, the price of the coal is fixed for its sale at Nashville, and after it becomes their property by delivery to them, and therefore the courts of Tennessee have the jurisdiction as to them. Various authorities are cited, and the debates in the senate of the United States are read, to sustain this view of the case. As

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I understand the contention of defendants' counsel it is that the agreement is not violative of the terms of the act of July 2, 1890; but, if it is, the act is unconstitutional: *First*. Because the constitution confers upon the courts of the United States in such a case jurisdiction over "controversies between citizens of different states." That the fact that parties to a contract are citizens of different states does not confer jurisdiction. There must be a controversy between the parties to the contract, and this litigation is not a dispute between the contracting parties, but between the government and these parties. *Second*. That the act creates and defines criminal offenses, and the constitution provides that the "trial of all crimes except in cases of impeachment shall be by jury," and that section 4 of the act, so far as it attempts to give circuit courts of the United States equitable jurisdiction over the violations of the act, is unconstitutional. It is insisted the proceeding authorized is, in substance, an information in equity charging defendants with a misdemeanor.

I shall not enter into a discussion of the constitutionality of the law. A court, especially an inferior one, should hesitate long and consider carefully before it should declare an act of congress, passed after deliberation and debate, and approved by the president, unconstitutional. The [485] reasons for such a decision in such a case should be clear and undeniable. If doubtful or questionable, the doubt should be resolved in favor of the law. The arguments against the validity of the act have been urged with great plausibility and strength, and an array of authorities have been read as sustaining the views of defendants' counsel. The positions of defendants' counsel have been met with equal force and ability by those representing the government, and many authorities have been referred to in support of the power of congress to pass the law; and without nicely adjusting and weighing the opposing views of counsel, enough appears to prevent me from declaring the act, or any part of it, as outside of the powers granted to congress by the constitution.

The remaining question is whether the agreement and regulations between the defendants are a "contract or combination in restraint of trade or commerce between states;" are

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they evidence of a combination to monopolize "any part of the trade or commerce" between the states of Tennessee and Kentucky? The coal mines are in Kentucky, and the coal is to be mined there for a certain price, and the agreement contemplates its shipment to Nashville. To be sure it is not to be transported thither by the defendants or any of them, but the price for which it is to be shipped is fixed or stated, and becomes a part of the price for which the coal is to be sold at Nashville; and when the prices fixed "are advanced in excess of the advance in freights, the one-half of the advance shall go to the mine owners and one-half to the dealers." In making the agreement the transportation of the coal from Kentucky to Nashville was a necessary incident to and element in the arrangement, and its execution would have been impossible without it. The instrumentality of transportation did not belong to nor was it controlled by them, but it was used by them and paid by them for services rendered. The contract provided for the sale of coal in Kentucky, its shipment to Nashville, Tenn., to dealers there, for its retail to consumers. It was, to all intents and purposes, a traffic, trade, commerce between states. Was the purpose of the exchange to monopolize a part of this trade, or to combine in restraint thereof? The exchange does not propose to be governed and controlled by the public markets arising from competition and the operations of the laws of supply and demand. On the contrary, it announces that its purpose is "to establish prices on coal at Nashville, Tenn., and to change the same from time to time as occasion may require," and in carrying out this object it asserts that—

"The exchange will establish prices at which coal shall be sold in Nashville, subject, however, to the following conditions and basis: Coal classed as No. 1 to be valued at the mines at $4\frac{1}{2}$ cents minimum price per bushel of 80 pounds for lump, and freight being 4 cents, the dealer's margin to be $4\frac{1}{2}$ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mines, No. 3, 6 cents; and when the above prices are advanced in excess of the advance in freights, then one-half of the advance shall go to the mine owners and one-half to the dealers. Any member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents a bushel and \$20 for the second offense."

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[436] These provisions, so far as this combination could do so, fixed the lowest price of coal to consumers in and near Nashville at 13 cents per bushel, and prevented coal being sold there at a cheaper rate, no matter how much less it might cost in an open and unobstructed market. Nor is that all. The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person, or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from any one who is not a member of the exchange." The coal trade is confined, so far as the market supply is concerned, to transactions between the miner and dealer, the prices are fixed by them, and the miner and dealer only are eligible to membership. The miners of the concern cannot sell to any dealer in or near Nashville who is not a party to the agreement, nor can such dealer purchase coal of any miner anywhere who is not a member of the body. The operations of both are confined within the membership. So far as Nashville is concerned, they cannot go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is positive and undeniable. Moreover, in the first section of the by-laws of the exchange it is asserted that "all coal used for manufacturing and steam-boat purposes shall be exempt from prices made by this exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers." This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steam-boats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market, to a large extent, at least, and that

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this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intentions of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute, and that there is no need of authorities to sustain such view of the case. Regarding the act as constitutional, I see no way for the defendants to escape its condemnation.

Proof has been taken, on one hand, to establish that the people of Nashville have been and are being injured by the high prices which have been and are being paid for coal, and the extent of the injury. On the other hand, defendants have introduced proof to show that the higher freight rates to Nashville, and the want of facilities for transportation by railroad and water, are the causes for the higher prices of coal at Nashville than at Louisville or Memphis, but it is needless to enter upon this branch of dispute. "The attempt to monopolize or combine" is de-[437] nounced by the second section of the act, and the first section declares that "every contract or combination * * * in restraint of trade or commerce among the several states * * * is hereby declared illegal." The attempt—the contract to do the thing prohibited—is enough to incur the penalties of this law.

I conclude that the defendants, by the organization of the Nashville Coal Exchange, and their operations under it, have been, and at the time of filing the petition in this cause were, guilty of a violation of sections 1 and 2 of the act of July 2, 1890, and should be enjoined from further violations of the law, as provided by the fourth section thereof.

The petition will be dismissed as to such of the defendants as are not, or were not, members of the exchange at the time of the filing of the petition.

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[338] CLARKE v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA ET AL.

CENTRAL TRUST CO. OF NEW YORK v. COMER ET AL.

(Circuit Court, S. D. Georgia, E. D. May 14, 1892.)

[50 Fed., 338.]

RAILWAY COMPANIES—ILLEGAL CONSOLIDATIONS—TRANSFER OF STOCK—

RIGHT TO VOTE.—The Ga. Co. of North Carolina acquired by purchase a majority of the stock of the Cent. R. Co. of Georgia, which it afterwards deposited with the Cent. Trust Co. of New York, and finally transferred to the Terminal Co., a system composed of several competitive lines of railroad. This company created a directory of the Cent. R. Co. to suit its purposes, which directory leased the Cent. R. R. to the R. & D. R. Co., a competing line. The lease was enjoined as contrary to Const. Ga. 1877, art. 4, § 2, par. 4, prohibiting the merger of competing corporations. The injunction order directed the election of a new board of directors for the Cent. R. Co., and provided that the stock of the company controlled by the Terminal Co. should not be voted in such election unless transferred in good faith. The stock in question consisted of 42,000 shares, 40,000 of which were those deposited by the Ga. Co. with the C. Trust Co. and transferred to the Terminal Co., and the remainder, 2,200 shares, acquired by the Terminal Co. from other sources. The Terminal Co. and the Ga. Co. filed a paper relinquishing to the Cent. Trust Co. any right they might have to vote such stock. *Held*, no interest in the stock appearing in the Cent. Trust Co., other than that of a mere stakeholder, that the relinquishment in question did not entitle it to vote.*

SAME—INCAPACITATING TRUST.—The Cent. Trust Co. was also incapacitated to vote such stock by the fact that it was trustee for a large amount of indebtedness of the Cent. R. Co., and, besides, its charter apparently gives no such power.

SAME.—The Cent. Trust Co. was unfit to be intrusted with the voting power in question because of the fact that its president, a financial expert, was engaged in an attempt to bring about a merger of the Cent. R. Co. with competing lines of railroad in the state of Georgia and place them under the sole control of the Terminal Co., contrary to the constitution of the state.

SAME—COMITY BETWEEN THE STATES.—Comity between the states will not authorize a foreign railroad corporation to exercise powers within the state which a domestic corporation would not be permitted to exercise under the constitution and policy of the state.

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SAME—COMPETING CORPORATIONS—ACQUISITION OF STOCK.—The fact that the charter of the Cent. R. Co., granted before the adoption of the constitution of 1877, permitted municipal corporations to purchase its stock, would not authorize a competing corporation to acquire such stock after the adoption of the constitution.

SAME—DISQUALIFYING INTERESTS.—The fact that the Terminal Co. has no appreciable interest in the stock of the Cent. R. Co., because of a mortgage on the railroad executed by the Terminal Co., does not remove the objection to its voting in person or by representative in the election of the directors of that railroad company, in view of the fact that it has large pecuniary interests in two directly competing lines of railroad.

[SAME—ANTI-TRUST LAW.—Transactions of this character are within the spirit, if not within the letter, of the "Sherman Anti-Trust Law." Act of July 2, 1890 (26 Stat. 209). See page 28.]

In Equity. Bill by Rowena M. Clarke against the Central Railroad & Banking Company of Georgia and others, and bill by the Central Trust Company of New York against H. M. Comer, receiver, and others. Motion by the Central Trust Company to modify an interlocutory decree. Motion denied.

Butler, Stillman & Hubbard and *H. B. Tompkins*, for the motion.

Lawton & Cunningham, Denmark, Adams & Adams, Daniel W. Rountree, Marion Erwin, and *A. O. Bacon*, opposed.

SPEER, District Judge.

It is essential to a clear understanding of the questions involved in this motion that a brief statement be made of the [339] proceedings heretofore had in the equity cause in which the motion is presented. It is also essential to direct attention in the outset to paragraph 4 of section 2, art. 4, of the constitution of the state of Georgia. This clause of the constitution is as follows:

"The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

The constitution in which this clause is found was adopted in the year 1877. It was evident at that time, and has be-

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come more plainly evident since then, that it was indispensable, by comprehensive and imperative enactments of fundamental law, to arrest the tendencies of corporate bodies towards abnormal and destructive aggregations of power; tendencies which could not have been foreseen, and which therefore had not been restricted and limited by the legislation of the past; tendencies which endanger the salutary purposes for which such corporations were created by the state, and which threaten to inflict upon vast multitudes of the people the most destructive injustice and injury,—injustice and injury against which it is obviously the duty of the government to afford them protection. It would be perhaps difficult to express in such narrow compass a restriction of corporate power more conclusive in its inhibitory effect, or more difficult to evade by those who for any motive would seek to avoid its legal force. *Langdon v. Branch*; 31 Fed. Rep. 449; *Hamilton v. Railroad Co.*, 49 Fed. Rep. 412. The original bill and interventions filed in this cause seek to apply to the facts of the case the legal effect of this constitutional provision and, further, to invoke the doctrine following, announced with great force and clearness by Mr. Justice GRAY in the supreme court of the United States in the case of *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 46, 11 Sup. Ct. Rep. 489:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside of the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it."

Further:

"That the lease by one corporation of its property and franchises to another corporation is unlawful and void, because beyond the corporate powers of the lessor, and involving an abandonment of its duty to the public."

It appears from the record before the court that on or before the 30th day of May, 1887, certain persons formed a design to obtain control of a majority of the capital stock of the Central Railroad & Banking Company of Georgia. While this company has assets amounting to many millions of dollars, its capital stock is only \$7,500,000. For the purpose of

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retaining an exemption from state taxation granted by the original charter the capitalization of the stock had been preserved at that comparatively low figure. From this fact it became relatively an easy matter to obtain a majority of the stock bearing the voting franchise. To accomplish this purpose, D. Schenke, Samuel H. Wiley, and Thomas B. Keogh organized, or attempted to organize, at Hight Point, in North Carolina, a corporation bearing the significant name of "The Georgia Company." The charter was granted by the clerk of the superior court of Guilford county, and the business of the company was, as therein stated, "to purchase, acquire, and to hold, or guaranty, to indorse the bonds or stocks of any railroad company in this or any adjoining state; to lease any railroad in this or any adjoining state; to engage in the business of transportation, and to operate railroads in this and adjoining states; to aid any railroad company in this or any adjoining state; 'except building any railroad,' which is forbidden in said statute." The charter does not appear to have any validity. See St. N. C. Acts 1885, p. 70. This appears to be both a banking and railroad corporation, and such corporations can be created by the legislature only.

It appears, however, that the persons mentioned in the original bill, who had bought about 40,000 shares of the stock of the Central Railroad & Banking Company of Georgia, turned over their entire holding to said Georgia Company; and it was further stipulated and agreed that this stock should be held in a block, with the view to permanently control the management of the Central Railroad and its properties. Thereafter it appears that the Georgia Company deposited with the Central Trust Company of New York its entire holding of this stock, and had issued thereon and sold to the public four millions of the bonds of said Georgia Company. In the mean time, by virtue of its majority control, it had taken charge, through a president and board of directors elected in the main by this block of stock, of the Central Railroad & Banking Company of Georgia. Thereafter the Georgia Company transferred all its capital stock to the Richmond & West Point Terminal Railway & Warehouse Company. This latter company thus came into control

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of the Central Railroad & Banking Company. It also had control of the Richmond & Danville Railroad Company, and of the East Tennessee, Virginia & Georgia Railway Company, both of which are directly competitive lines of the Central Railroad & Banking Company. The Terminal Company (as we shall call it for the sake of brevity) now put out, through the Central Trust Company of New York, a large issue of its bonds, secured by a mortgage deposited with the Central Trust Company, on its stock holdings, in all the properties under its control.

With reference to the 40,000 shares of stock of the Central Railroad deposited with it as collateral to secure the bonds of the Georgia Company, it was stipulated in the mortgage that whenever the Terminal Company presented a bond of the Georgia Company the Central Trust Company should issue in lieu thereof a bond of the Terminal Company. Two millions of the bonds of the Terminal Company were left on deposit with the Central Trust Company, with the avowed purpose of procuring by the use of said bonds the 32,000 shares of stock of the Central Railroad, which had not yet been secured by the Terminal Company or the pro- [341] moters of the scheme to possess and control the Central Railroad & Banking Company of Georgia. The Central Trust Company thus became the trustee for this mortgage, a salient feature of which was the design to compass the absolute and undivided ownership of the Central Railroad by a company controlling rival lines, largely by means of the use which had been made of a majority of its stock held in a block by this contract or voting trust, apparently a corporate purpose to obtain \$3,200,000 in stock of a company it controlled for \$2,000,000. The Terminal Company had obtained elsewhere 2,200 shares of stock, which it likewise deposited with the Central Trust Company; and with regard to all of this stock, thus deposited, it was stipulated by the promoters of the scheme that its voting power should be retained by the Georgia Company, and afterwards, when the Terminal Company absorbed that, by the latter. By means of this voting power the Terminal Company was now the master of the destinies of the Central Railroad, and its president and board of directors had become a directory which was in the control

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of the Terminal Company, and, if need be, removable by it. In pursuance of the scheme, this directory on the 1st day of July, 1891, leased for 99 years the Central Railroad & Banking Company of Georgia, and all of its property, nominally to the Georgia Pacific Railroad Company, but really to the Richmond & Danville Company, both of which were under the control of the Terminal Company, which now directed the operation of all the Central properties, with the most disastrous results to the immense and vital system of which it had thus become possessed. This lease and the proceedings of those in charge of the control of the Central Railroad & Banking Company are attacked by the original bill. A temporary receiver was appointed. While this officer was proceeding to take possession of the assets of the Central Railroad & Banking Company the Georgia Pacific and Richmond & Danville Companies threw up the lease, and formally abandoned the possession of all the properties. At the hearing of the rule to show cause why the injunction prayed for should not be granted, and the receiver appointed, after an investigation lasting through several days, the court (Judges PARDEE and SPEER presiding) granted an interlocutory order appointing receivers to take charge of the properties and assets of the Central Railroad & Banking Company, and all subsidiary railroads and steamship companies. The order directed an election for a board of directors to be held on the 16th day of May, 1892, and it enjoined the Central Railroad & Banking Company from receiving the vote of the 42,200 shares of stock controlled by the Terminal Company, and held by the Central Trust Company of New York. It provided, however, that, in case there should be a transfer of that stock in good faith, it might be voted, provided that the court approved the genuineness and legality of the transfer.

The proceeding now before the court is brought to have that order modified, so that the stock may be voted by the Central Trust Company and counted in the election on Monday next. The motion involves the control of the Central Railroad & Banking Company of Georgia, and the many millions of property which constitute its assets. The Central Trust [342] Company is a party defendant to the original

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bill, and, in the opinion of the court, might well be held to be bound by the former adjudication. Its counsel were present at the hearing. The cause had been continued in part upon the application of its counsel; they stating that they desired to be heard. It being insisted, however, that the situation of this stock has been changed since that judgment was rendered, the court has heard its application. There are now presented on the part of the Central Trust Company two written representations, one signed by the Georgia Company, by T. W. Scarborough, president, and the other by the Richmond & West Point Terminal Railway & Warehouse Company, by John A. Rutherford, second vice president. The representations both recite the fact of the deposit of the 40,000 shares of Central Railroad stock with the Central Trust Company for the purpose of securing the bonds above mentioned, and they both contain this further statement:

"It may be claimed that the adjudication by your honorable court bears the construction that this company shall not exercise the right to vote upon the said stock reserved by the said deed of trust, and in view of such decision this company yields, transfers, and surrenders any right which it possesses or possessed to vote upon the said stock, or any part thereof, at the election of the shareholders of the Central Railroad & Banking Company of Georgia to be held May 16, 1892, or at any adjournment thereof, in favor of the said Central Trust Company, representative of the said bondholders, the legal and equitable owners of the said 40,000 shares of stock. In making this surrender of any right to vote upon the said stock, the Georgia Company represents to the court that it has not entered into any arrangement, bargain, or understanding of any kind or nature whatsoever with the said Central Trust Company in respect to the exercise of the voting power upon the said stock by that company, and that it will not make or endeavor to make any such bargain, contract, or arrangement, and that the said Central Trust Company shall be entirely free, independent, and untrammelled, so far as the said Georgia Company is concerned, from any direction, interference, or control in the exercise by it of such voting power."

The representation of the Terminal Company purports only to surrender the voting right in 2,200 shares of stock. Both representations restrict the transfer of the voting right reserved by the Terminal Company to the election to be held on May 16, 1892, or at any adjournment thereof. It is difficult to perceive how this instrument differs in any matter of substance from an ordinary proxy. The transfer of the Georgia Company of its right to vote the stock is not considered by the court as material, for that company has really no control over the stock to which a court of equity will pay

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any attention. The Georgia Company has been wholly absorbed by the Terminal Company, but the Terminal Company omits to make any transfer of the right to vote the 40,000 shares of stock in question, and limits its representation to the court to 2,200 shares, which it has presumably acquired from sources other than the Georgia Company. It follows, therefore, that as to 40,000 shares of this stock the condition is precisely the same as when the court enjoined the Central Railroad from receiving or counting the votes thereof, for the reason that it had been purchased and held in violation of the laws and constitution of Georgia. But, as we have seen, the transfer of [343] the Terminal Company relating to 2,200 shares is nothing more than a proxy; and, the Terminal Company being enjoined from voting the stock directly, it cannot be permitted to vote it by proxy, unless, indeed, it is thought proper to set aside the former judgment of the court in this respect. There appears to be no consideration whatever for this transfer. The Central Trust Company of New York holds this stock merely as a naked trustee to secure certain bonds for which it was pledged as collateral security. Now, when those bonds were issued the stock thus pledged had attached to it no voting power, of which either the Trust Company or the bondholders had the right to avail themselves. Its voting power, therefore, was no part of their security. This transfer, even if it were efficacious to convey the voting franchise of all the stock, would be merely an attempt to ingraft upon the trust a new feature, which the beneficiaries of the trust did not seek, or expect, at the time of its creation. The voting of the stock was enjoined because it was deemed by the court that it would bring about a public wrong, the gravity of which cannot well be foretold. It was further deemed to threaten the continuance and perhaps the aggravation of the illegal and injurious results it had already accomplished. If the Central Trust Company was wholly relieved of any entanglement, with the perplexed and chaotic condition, which the voting power of this block of stock, and the illegal, reckless, and destructive management, its exercise, has entailed upon these properties, the court would even then hesitate long before it would avoid the injunction, which was the outcome of the most anxious consideration by the

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learned circuit judge, and by the district judge, merely because the Terminal Company, enjoined from voting itself, had gratuitously conveyed to the Trust Company the power which the latter apparently had not desired, and which was in no sense a part of the contract with its bondholders. But the Central Trust Company is not, in our opinion, in any view, a proper party to vote this stock. It has no interest of its own in the stock. It is simply a stakeholder. There are many situations in which stock may be so placed that it becomes inequitable or illegal for it to be voted. The law places the voting power of pledged stock in the pledgor or mortgagor, even where there is no express stipulation to that effect. *Schofield v. Bank*, 2 Cranch, C. C. 115; *Vowell v. Thompson*, 3 Cranch, C. C. 428. And where the pledgor or mortgagor is disqualified to vote the stock the disqualification extends as well to the pledgee or trustee. *Ex parte Holmes*, 5 Cow. 426; 1 Woods, Ry. Law, § 61, p. 149, and cases cited. See, also, *Bank v. Sibley*, 71 Ga. 726; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10. It may well be doubted if the charter of the Central Trust Company affords any authority for the exercise of such a power. It is what its name imports, a trust company, and, as was well said in the argument of one of the counsel, if the Central Trust Company "springs from the passive position of a naked trustee into the active operation of a great railroad system," the court must be clearly satisfied of its authority by law to do so. If it may do this, it has within its gift the appointment of every officer of this vast railroad system, from president to flag- [344] man; and all the vast and most important powers of the railroad, powers in which the people of states distant from the office of the Central Trust Company are profoundly concerned, are likewise within its control. It is moreover the trustee, as we are informed by its counsel and as it appears from the evidence, for twenty-six millions of the indebtedness of this road. It is, then, the agent for its creditors. Can it also be the agent for the debtor? If so, it is easily possible that when the agent of the creditor perceives a debt to be due the agent for the debtor may make default, and thus the entire property be brought to the block. In stating this possibility, no reflection is intended on this great financial institution, but the law will not

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permit conflicting trusts or conflicting interests to be reposed in one trustee.

Besides, it appears from the evidence that the accredited president of the Central Trust Company is and has been concerned as the financial expert seeking to bring about a consolidation and reorganization of all the railroads which are or have been under the control of the Terminal Company. These roads operate the competing lines in the state of Georgia, and in the statement of March 1, 1892, addressed by Mr. Frederick P. Olcott, president of the Central Trust Company, to the holders of securities of the Terminal Company, this appears:

"In view of the pending litigation affecting the Central Railroad & Banking Company of Georgia, and questions which are before the courts undetermined respecting its existing lease, and considering the legal difficulties attending a consolidation embracing that company, the committee has found it advisable to make no provision for the present for taking up the outstanding stocks or securities of the Central Railroad & Banking Company of Georgia, but the interest of the Richmond Terminal Company in these stocks and securities will vest in a new corporation, and form a part of the security on a new first mortgage bond."

The East Tennessee, Virginia & Georgia securities will be covered by the same mortgage, and the two roads will be under the same control. Can it be denied that this avowed purpose would have the effect, or be intended to have the effect, to defeat or lessen competition, and to encourage monopoly? And yet with the voting power of this stock in its control the Trust Company can accomplish this result. Not only is this true, but if it be competent for the Central Trust Company to operate one railroad system of which it holds securities, if a few words from the mortgagor, transferring the voting power of stocks pledged with it, can give it control, what it may do with one road it may do with another. If it may vote the stock of the Central, it may vote the stock of the East Tennessee, Virginia & Georgia, the Louisville & Nashville, and all the others, and thus the railroads of an entire section may be the playthings of the officers of this corporation. Surely this may tend to defeat or lessen competition and to encourage monopoly. But whatever may be the powers of the Central Trust Company elsewhere, it certainly cannot exercise such powers as we

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have described within the state of Georgia. A corporation of this state could not do so. Comity between the states authorizes a corporation to exercise its charter powers within another state, but it does not permit the exercise of a power where the policy of [345] that state, distinctly marked by legislative enactments or constitutional provision, forbids it. *Runyan v. Oster*, 14 Pet. 122; *McDonogh v. Murdock*, 15 How. 367; *Marshall v. Railroad Co.*, 16 How. 314.

It is said, however, that, by the charter of the Central Railroad & Banking Company, other corporations may own stock in that company. It is quite evident that the language upon which counsel for the movant rely relates to corporations of the classes mentioned in the charter. The cities of Macon and Savannah are mentioned, and other corporations are authorized. Under a familiar rule of construction, this would seem to mean other municipal corporations. Be this as it may, if any other corporation had not purchased the stock before the constitution of 1877, such other corporations cannot since then buy it, or hold it on any contract or agreement whatever which might have the effect, or be intended to have the effect, to defeat or lessen competition or to encourage monopoly. This would be especially true of a non-resident corporation, which, when it enters the state, does so with submission to the settled policy of the state. The court recognizes the soundness of the authorities cited by the learned counsel for movant in argument. It is, however, true that they do not apply to a case like this. It is perhaps true that there is no precedent precisely pertinent to the grave issues presented by this controversy. They have sprung into existence because of the marvelous railroad development of the country, and because of the ease and facility with which a trust owning a bare majority of the stock of a corporation can nullify and deaden the vote of all the minority stock, however great the minority, or however rightful and intelligent would be its exercise. The alarming effect of this power may be illustrated by the facts of this case. Forty thousand shares of stock have deadened the votes of 32,000 shares, and have controlled as many millions in values. These 40,000 shares have been deposited, and bonds issued thereon.

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If the voting power of the stock is apportioned among the bonds, 20,100 shares may control the policy of the entire block, and these 20,100 shares may thus control all the millions belonging to the Central properties, and yet stockholders who have 32,000 shares have no voice in the management of the properties, in which perhaps their all is invested.

Even where individuals form a combination to control the majority stock of a corporation, and agree not to transfer their shares to the opposition or not to vote against the combination, such contracts have been held to be void as in restraint of trade, and against public policy. Ordinarily any stockholder may withdraw from such a contract, although it is expressly agreed that it shall be irrevocable. 1 Beach, Priv. Corp. § 305, and cases cited.

It is insisted by the petitioners that the Terminal Company has no appreciable interest in the stock of the Central Railroad. The interest it formerly had was conveyed by the mortgage of 1889. The bonds executed under that mortgage, and secured by the Central stock, have long ago been sold, and the proceeds appropriated by the Terminal Company. But that company has a substantial and large pecuniary interest in the [346] Richmond & Danville and the East Tennessee, Virginia & Georgia Railroads. These roads are the natural competitors of the Central. Is it surprising, then, that the Terminal Company, controlling by this "voting trust" the management of the Central, should make the road in which it is not interested suffer for the benefit of its rivals, which it not only controls, but possesses? It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the act of congress, known as the "Sherman Anti-Trust Law." Act July 2, 1890, (26 St. at Large, p. 209.) It certainly is, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law. The baleful effects of such an unlawful scheme have been most significantly illustrated by the record itself. The property of one of the oldest and most renowned railroads in the United States has been brought to the verge of ruin. These stocks were once so solvent and

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reliable that trust estates, the property of widows and orphans, of charitable and eleemosynary institutions, were invested in them, at the will of the trustees, without an order of court to sanction the investment. The properties have been impoverished in every department. Skillful artisans and mechanics, who from their apprenticeship have been in the service of the companies, have been turned away. Vast buildings which were once musical with the whirr of machinery and the voices of prosperous and contented workmen, earning by their useful and valuable labor a comfortable livelihood, are now voiceless. The ashes sleep undisturbed on the forge, and the hammer rusts on the anvil. Merchants and tradesmen who have depended upon the purchasing power of these operatives have been threatened with ruin; numberless houses once occupied by their happy families are now vacant; and those whose all is invested in the securities of this company are haunted with the expectation that the road may default upon its obligations, and be sold under the hammer on foreclosure, and the provision made for their declining years swept from existence. But this, and all of this, is unimportant, compared with the greater interest of the people in their rightful demand that the corporation created by them, and granted vast and valuable franchises, shall be managed as a railroad upon lawful business principles, in the transportation of freight and passengers, and for the development of the state, and that it shall not be the toy of the speculator, and that the franchises which they granted for nobler purposes shall not be made the instrument of their ruin and the degradation of the state. The possession of its stock does not give uncontrollable right in the management of a railroad corporation. The right of the state that the corporation should conform to the purposes for which the law created it is wholly paramount to any and all rights of stockholders. It may not be doubted that the values represented by these 42,000 shares of stock are entitled to the protection of the court, and they will be protected. When it is offered to vote them with the legitimate purpose for which the majority of shares of stock in a corporation may be lawfully voted, at the instance [347] of parties who have legal authority to hold and vote them, they will be voted. The

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court will be, moreover, happy to entertain any proposition for voting them which will result in the management of this road in such manner that it need not be wrecked; in such manner that its matchless properties may be utilized to pay its obligations as they mature, and to protect its values. It is well understood by the court that the mere fact that this stock may not be voted in its present illegal *status* is a menace to the credit of the Central Railroad, and to the power of the court and of its receivers to redeem it for the benefit of all concerned. We have no doubt that, properly managed in accordance with the law, with the encouragement of those who are friendly to it, which its great importance deserves, the Central Railroad & Banking Company cannot only pay its obligations as they mature, but rehabilitate its fortunes, imperiled as they are by this illegal trust voting a majority of the stock, the exercise of which the court has enjoined. The court is quite as solicitous to protect the interest of the creditors as of stockholders of this great property, but there is nothing in this motion which will justify the court in changing the order, which was mainly, indeed, we may say almost wholly attributable to the wisdom, experience, and acumen of the learned circuit judge; an order intended to preserve the property for the present, to gather anew its dissipated assets, and to restore it as speedily as possible to the lawful charge of those who may be found legally entitled to its management and control. Let an order be taken, denying the application.

[469] UNITED STATES *v.* GREENHUT ET AL.

(District Court, D. Massachusetts. May 16, 1892.)

[50 Fed., 469.]

ILLEGAL TRUSTS AND MONOPOLIES—INDICTMENT.—Act Cong. July 2, 1890, (26 St. p. 209,) “to protect trade and commerce against unlawful restraints and monopolies,” provides, in section 2, that “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor,” etc. *Held*, that an indictment thereunder which fails to allege that defendants monopolized, or conspired to monopolize, trade and commerce among

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the several states, or with foreign nations, falls to state an offense. even though it does allege that they did certain acts with intent to monopolize the traffic in distilled spirits among the several states, and that they have destroyed free competition in such traffic in one of the states, and increased the price of distilled spirits therein.*

At Law. Prosecution of Joseph B. Greenhut and others for violation of the law against monopolies. Indictment quashed.

Frank D. Allen, U. S. Atty.

Elihu Root, Richard Olney, Simpson, Thacher & Barnum, Charles A. Prince, and Bordman Hall, for defendants.

NELSON, District Judge.

This is an indictment under the second section of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 St. p. 209. The indictment sets forth that the defendants are the officers of the Distilling and Cattle Feeding Company, a corporation chartered by the laws of the state of Illinois, and having its principal place of business in Peoria, in that state; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries within the United States; and, within certain dates specified, used, managed, controlled, and operated said distilleries, and manufactured sixty-six million gallons of distilled spirits, and sold the product within the United States, part of it in the district of Massachusetts, at prices [470] fixed by them, the whole being seventy-five per cent. of all the distilled spirits manufactured and sold within the United States during the period; that all said acts (except the purchasing and leasing of the distilleries) were done with the intent to monopolize to the company the manufacture and sale of distilled spirits in Massachusetts, and among the several states, to increase the usual prices at which distilled spirits were sold, to prevent and counteract free competition in the sale of distilled spirits, and thereby to exact great sums of money from citizens of Massachusetts and of the several states, and from all others purchasing; that, in pursuance of such intent, the defend-

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ants, as such officers, agreed with D. T. Mills and Co. and other dealers in Massachusetts that, if such dealers would buy all their supplies of distilled spirits from the company for six months, the company would give them a rebate of two cents a gallon on their purchases; that by means of the rebate agreements and by their control of the distilleries, and of the manufacture, sale, and prices of seventy-five per cent. of all the distilled spirits manufactured and sold in the United States during the period named, the company, and the defendants as its officers, had made large sales of distilled spirits to D. T. Mills and Co. and other dealers in Massachusetts at prices fixed by the defendants in excess of the usual prices at which such spirits were then sold in that state, such spirits having been manufactured in other states, and transported therefrom into Massachusetts, and had unlawfully monopolized to said company the manufacture and sale of distilled spirits, and had increased the usual prices at which distilled spirits were then sold in Massachusetts, and had prevented and counteracted the effect of free competition in the price of spirits in Massachusetts, and had exacted and procured great sums of money in said district from D. T. Mills and Co. and others. To this indictment the defendant Greenhut filed a motion to quash, and the other defendants demurred, upon the ground that the indictment is insufficient in law, and does not charge any offense created by any statute of the United States.

The second section of the act is as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

An indictment framed under this section should contain a distinct averment in the words of the statute, or in equivalent language, that, by means of the acts charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations. This indictment contains no such averment. It does not charge that the defendants entered into any unlawful combination or conspiracy. Nor does it con-

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tain any averment that they had monopolized trade or commerce among the several states [471] or with foreign nations. It avers merely that by means of the acts alleged they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts, and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offenses by the statute. The indictment in this particular is clearly insufficient according to the elementary rules of criminal pleading, and charges no offense within the letter or spirit of the second section of the statute.

Other questions presented upon this indictment were argued by counsel, and among them the important questions whether the acts charged constitute an unlawful monopoly, within the meaning of the statute; and, if they do, whether congress has the constitutional authority to declare such acts to be unlawful and criminal, and whether the things charged against the defendants were not rather the doings of the corporation than of its officers. In regard to these questions it is only necessary to remark that they seem to be of such a character as to require that they should not be decided finally against the government by the trial court, but should be reserved for the determination of the appellate court, when presented upon an indictment not otherwise insufficient in law. Indictment quashed. Judgment for the defendants.

[205] IN RE CORNING ET AL.
UNITED STATES *v.* GREENHUT ET AL.

(District Court, N. D. Ohio, E. D. June 11, 1892.)

[51 Fed., 205.]

MONOPOLIES—CRIMINAL LAW—INDICTMENT.—An indictment under the act of July 2, 1890, relating to monopolies, averred that defendants,

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in pursuance of a combination to restrain trade in distillery products between the states and monopolize the traffic therein, acquired by lease or purchase, prior to the passage of the act, some 70 distilleries, producing three quarters of the distillery products of the United States, and that they continued to operate the same after the passage of the law, and by certain described means sold the product at increased prices. *Held*, that no crime was charged in respect to the purchase or continued operation of the distilleries, since there was no averment that defendants obligated the vendors of the distilleries not to build others, or to withhold their capital or experience from the business.¹ *

SAME.—The indictment further averred that defendants, in pursuance of the combination, shipped certain of the products to Massachusetts, and sold them there through their distributing agents to dealers, who were promised a rebate of five cents per gallon on their purchases, provided such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices, said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, that no crime was charged with respect to such sales, since there was no averment of any contract whereby the purchasers bound themselves not to purchase from others, or not to sell at less than list prices.

CRIMINAL LAW—FEDERAL COURTS—REMOVAL OF PRISONER.—On an application to a federal court for the removal of a resident of the district to a distant state and district for trial, it is the duty of the court to scrutinize the indictment, disregarding technical defects, but to refuse the warrant if the crime alleged is not triable in the district to which a removal is sought, or if the indictment fails to charge any offense under the law.

At Law. Indictment against Joseph B. Greenhut and others for violating the law against monopolies. Heard on application for a warrant to remove defendants to another district for trial. Denied and prisoners discharged.

Allen T. Brinsmade, Dist. Atty., for the United States.

Elihu Root, *Thos. Thatcher*, and *S. E. Williamson*, for defendants.

¹ See *U. S. v. Greenhut*, 50 Fed. Rep. 469 [ante p. 30], for a decision in the district court of Massachusetts on motion to quash.

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RICKS, District Judge.

This cause comes before me upon the application by the district attorney for a warrant for removal to the district of Massachusetts of Warren Corning and Julius French, citizens of this judicial district, against whom is pending an indictment preferred by the United States in the district court for the district of Massachusetts. A certified copy of the indictment, together with the return of A. J. Williams, a United States commissioner for the circuit court of this district, that said defendants refused to give bail, and were by him committed, is filed. The defendants object to the granting of a warrant for removal, because the indictment does not charge an offense against the laws of the United States. Being residents and citizens of this judicial district, they [206] claim the right, upon this application, to challenge the sufficiency of the indictment, and insist that it is the duty of the district judge, before ordering the removal of a citizen to a distant district for trial, to scrutinize the indictment, and to refuse the warrant in case it appears upon the face of the indictment either that the crime alleged was not committed in the district to which the removal is asked, or that the indictment does not sufficiently charge an offense under the law, or for other material defects in that instrument, or in the act upon which it is founded. The order of removal is not a mere ministerial act on the part of the district judge, but is a judicial function, including the exercise of a legal discretion upon the papers presented in support of the application. I fully concur in the opinion of Judges Dillon and Treat in *Re Buell*, 3 Dill. 116. In that case, on the proposition that the question of the sufficiency of the indictment was for the court in which it was found, and not for the district judge on an application for the warrant of removal, Judge Dillon said:

"I cannot agree to the proposition in the breadth claimed for it in the present case. The provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is not a light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely provides the previous sanction of the district judge to such removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner when the

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only probable cause relied on or shown was an indictment, and that indictment failed to show an offense against the United States, * * * would misconceive his duty, and fail to protect the liberty of the citizen."

Ordinarily, where an offense charged was committed in the district where one or more of the several defendants reside, the trial of the accused should be had in the district of which he is or they are inhabitants. Where an offense has been committed in several different districts, and the accused reside in other and different districts, the government has a right to elect in which one of the districts the prosecution may be conducted; and, under proper conditions, may elect to prosecute them in a district other than that in which they or either of them reside. There may be exceptional conditions which would justify prosecution in a district remote from that in which any one of a number of defendants resides, or far remote from the district where the principal business of the accused is conducted. But the spirit of our laws is to indict and try offenses in the district where the defendants reside, if the offense was committed in such district, and if local influences and prejudices are not too serious obstacles to be overcome.

I am moved to these remarks because it appears in this case that, if the indictment sufficiently charges an offense in the district of Massachusetts, a similar offense was committed in almost every other district of the United States, and more flagrantly in the district in which some of the accused reside, and in one of which several of them reside and conduct their principal business. It appears from the indictment that one of the defendants resides in the southern district of New York, where [207] many transactions similar to those averred in the indictment take place; several reside in the southern district of Ohio; several reside in this district; and several reside in the northern district of Illinois, where the corporation was organized and has its legal residence, and conducts its principal business. In each of these four districts similar offenses were committed.

These are not stated as reasons why they should not be removed for trial, if, in fact, a sufficient indictment is pending against them in the district of Massachusetts, but rather as justifying a closer scrutiny into the indictment than if the

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only offenses committed were those alleged in this indictment, or the district of Massachusetts was the only place where the strong arm of the law could reach them. Does the indictment charge an offense under the act of July 2, 1890, known as "An act to protect trade and commerce against unlawful restraints and monopolies?" The first section of the act declares illegal "every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations." The second section declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

The indictment alleges that before the enactment of the law in question the defendants, for the purpose of monopolizing and restraining the trade and commerce in distillery products among the several states of the nation, combined with others, and purchased or leased or otherwise obtained control of 70 distilleries, which had theretofore been competing, separate distilleries, and so operated them as to produce 77,000,000 gallons of distillery product, which output comprised about 75-100 of the total production of the distilleries of the United States; and that the condition of trade in such products during the period charged was such that the defendants, by means of their combination, were able to prevent free competition on the actual price of such products, and thereby control the price, so as to augment and increase the price thereof to consumers in the district of Massachusetts, and to restrain trade therein among the several states.

The first count of the indictment alleges a combination on the part of the defendants to restrain the trade and commerce in the district of Massachusetts, and between that state and other states of the Union, in distillery products, of which it charges that defendants produced 75-100 of the entire production of the United States, and avers that on October 8, 1890, they sold to Mills & Gaffield, in Boston, 5,642.82 gallons of alcohol, said alcohol being part of the product of said distilleries, and made in Peoria, Ill., and intended to be trans-

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ported and sold to said Mills & Gaffield in Boston; and with the intent to restrain the trade therein they fixed the price at which said Mills & Gaffield should sell the same in the district of Massachusetts, or for transportation to the other states, and did compel said Mills & Gaffield to sell said alcohol at no less price than that fixed by the defendants; and, by reason of their com- [208] bination, said defendants did control the amount of said products sold in said district or for transportation to other states, and did counteract the effect of free competition on the usual price at which said products were sold in Massachusetts or for transportation to other states, and did increase and augment the price at which said products were sold in said state, and for transportation to other states, and did thereby exact and procure great sums of money from the citizens of said district, and thereby, and by other means to the jurors unknown, restrain the trade and commerce in said products, between the state of Massachusetts and other states of the Union.

The second count charges the defendants with combining and monopolizing to themselves the trade and commerce in distillery products. It charges, in the same terms set forth in the first count, the purchase and lease of 70 distilleries, controlling 75-100 of the distillery products of the United States, which distilleries had been before that time competing producers; and with the same purpose, to monopolize the trade in said products, they made 75-100 of the entire output of the distilleries of the several states; and with the intent of controlling the trade and price of said products in said state of Massachusetts, and between the several states, and of monopolizing the trade in said state and between said states, did, on the 18th day of September, 1890, sell to C. I. Hood & Co., of Lowell, in said state, through Webb & Harrison, as distributing agents for defendants, 526.52 proof gallons of alcohol, and with intent to monopolize said trade did then and thereby promise said Hood that if, for a certain time agreed upon, said Hood should purchase exclusively from the defendants his supplies of such goods as defendants were then making, and during that period should not sell such goods at any lower prices than the list of the defendants' distributing agents, and should subscribe to a certificate that he

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had purchased all such supplies from defendants, and had not sold the same at prices lower than their distributing agents had sold the same, then defendants would return to said Hood five cents per proof gallon on the goods so purchased by Hood. On September 23, 1891, Kelly & Durkee having purchased from said Webb & Harrison, as distributing agents of defendants, 85.54 proof gallons of alcohol, said defendants, with intent to, and in pursuance of said attempt to monopolize the trade, etc., did at Boston, on said date, promise Kelly & Durkee that, if for the period agreed on they purchased exclusively of one or more certain dealers named, their supplies of goods then made by defendants, said dealers being then distributing agents for defendants, and should not sell such goods at any lower prices than such dealers' list prices, which said defendants controlled and fixed, and should certify that they purchased all their distillery products for said period from some one of the dealers so named by defendants, and had not sold any goods so purchased at any lower prices than said dealers' list prices, with freight (if any) paid, then said defendants would repay to said Kelly & Durkee five cents for each proof gallon purchased; and that defendants, in pursuance of said combination, did make other promises to Hood, to the [209] same effect, and also to Kelly & Durkee, and did thereby, in the way charged, attempt to monopolize the trade in said products in said district, and between the several states of the Union.

The third count charges a combination in restraint of trade, alleging a transaction with Hood on October 2, 1891, involving purchases by him of 518.81 gallons of distillery products, under circumstances substantially the same as averred in the preceding counts; alleging that defendants promised Hood, six months from the date of said purchases, a rebate of five cents per gallon, upon conditions similar to those averred in the second count, and averring divers other similar contracts with Hood in the said district.

And the fourth count avers that on the 7th day of May, 1892, said defendants entered into a certain contract in restraint of trade and commerce in distillery products among the several states, and especially in restraint of trade and

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commerce in Massachusetts and other states, with Kelly & Durkee, which contract was, in substance, that, for the purpose of securing the continuous patronage of the purchaser, the defendants, six months after date, promised to repay to Kelly & Durkee five cents per proof gallon of defendants' products then purchased, upon condition that said purchasers or their successors, from date of voucher or purchase to time of payment, shall buy exclusively such kind of goods as are produced by defendants from some one of their agents designated, and shall not sell the same at prices lower than said dealers' list prices, and shall certify to that effect, said defendants acting in the name of the Distillery & Cattle Feeding Company, being from the 22d of September, 1891, up to the finding of the indictment, manufacturers of said distillery products within certain states of the United States other than Massachusetts, and the kind of goods referred to in said contract being distillery products, said Kelly & Durkee having on the said 7th day of May complied with all the conditions of said contract. The first, third, and fourth counts are based on the first section of the act, and charge a combination and conspiracy in restraint of trade, while the second count charges a combination to monopolize a part of the trade in distillery produces between the states.

Now, giving to this indictment the broadest possible construction; giving to the facts therein set forth and to the acts committed the meaning most favorable to the prosecution,—what is the offense charged? It is that the defendants, prior to the act of July 2, 1890, by lease or purchase, acquired some 70 distilleries throughout the several states of the Union, and from them produced 77,000,000 gallons of distillery products, which then constituted 75-100 of the entire distillery products of the United States, and that they continued to operate said distilleries on the same extended scale after the act became a law; that part of these products were shipped to the district of Massachusetts, to be sold there and for transportation to other states, and sold by the defendants, through their distributing agents, to dealers in Massachusetts, under a promise on the part of the defendants that if said dealers should purchase their distillery products exclusively from the [210] distributing agents of the defend-

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ants, and should sell the same at prices not lower than the list prices of such distributing agents, and should at the expiration of six months after such purchases certify that they had so exclusively purchased from defendants' agents, and had so sold at the said prices, then defendants would pay to such dealers a rebate of five cents per gallon on all their purchases. The indictment avers that the price at which said products sold was higher than had before that time prevailed, and that by said arrangement defendants controlled and augmented the prices of said products, and by said means exacted and received from the people of the district of Massachusetts a large amount of money over and above that usually received for such products.

These are the substantial facts relied upon to constitute the crime. Of course, it is alleged, with the usual particularity, that all this was done in pursuance of a combination to restrain trade between the states, and to monopolize to the defendants the traffic in the several states in distillery products, and done with the intent and purpose to control the production of said articles and fix the prices at which they should be sold. But it is not sufficient to charge an unlawful intent, or to aver that a combination or a course of business is in restraint of trade, or a monopoly of trade, in order to constitute a crime. Acts relied upon to make the offense must be stated. A combination of act and intent is needed to constitute a crime. No averment of intent alone is sufficient; neither is any amount of act alone; the two must combine.

Assuming an unlawful intent and purpose of a combination to restrain trade and monopolize traffic in these distillery products, as charged in the indictment, do the acts set forth constitute such restraint and monopoly? In what respect did the sales made, as charged, restrain trade or monopolize the traffic in distillery products? These terms, as used in the act of congress under consideration, are well defined at common law, and must be considered with reference to such established meaning. The indictment was prepared with great care by the district attorney of Massachusetts, and it is safe to assume that he has charged therein all the acts which he believed it possible to prove upon the trial. Assuming this to be true, the indictment is significant in what it

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omits to charge in the respects above referred to. It is not averred that, when defendants purchased their 70 distilleries, they obligated the vendors not to build other distilleries, or not to continue in the distillery business in the future. It is not averred that defendants attempted in any way to bind the vendors to withhold their capital or skill or experience in the business from the public in the future. There is no averment that the defendants in any manner, or at any time, attempted to control the business of the remaining one fourth of the distilleries in the United States, or in any way attempted to limit their output, or by agreement with them control the price at which their products should be sold, or in any degree restrain their trade, or limit the territory over which their trade should extend. The full scope of the averments in this respect is that before this law was passed by congress the defend- [211] ants legally purchased with their own capital three fourths of the distilleries in the United States, and that they produced 77,000,000 gallons of distillery products, and sold these products in the markets of the several states at the best possible prices; and that they continued so to own and operate said distilleries, and so to sell their products, after the passage of this act. This they did without any attempt at any time, by contract, to control the production of the other distilleries, or the prices at which they should sell, or without any contract with such distillers in any way restraining trade. The indictment, therefore, in my judgment, wholly fails to charge a crime, so far as the purchase of said distilleries or their manufacture of distilled products before the passage of the act is concerned, or so far as they are charged with continuing to own and operate them with unlawful intent after the passage of the act.

Do the acts, in connection with the transportation and sale of said products in the district of Massachusetts as charged, constitute an offense? The substantial facts in this respect, as averred, are that defendants sold their products in Massachusetts, through distributing agents, to dealers there, who were promised a rebate of five cents per gallon on all their purchases, provided said dealers purchased their distillery products exclusively from defend-

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ants' agents, and provided they sold the same at prices no lower than the list prices of such agents; and said rebate was to be paid when the dealers should sign a certificate that they had so exclusively purchased from defendants' agents, and had so sold at prices no lower than the list prices of said agents. The indictment in these averments is again significant for its omissions. It fails to charge a contract on the part of the dealer that he would not purchase distillery products from other distilleries, or any contract on his part binding himself to sell at defendants' prices. Such dealers were offered the rebate as an inducement to purchase exclusively from the defendants, and to sell at the prices defendants fixed; but there is no contract averred by which the dealers obligated themselves to do so. In what respects, then, are these acts charged different from the customary efforts of manufacturers or dealers to increase the sale of their products and push their business by the many artifices of trade?

There are no contracts averred, as between the defendants and their customers, which are in restraint of trade. Their acts are rather intended to increase their trade, but not by restraining the liberty of the customer to deal with others, if he wishes to, or can do so, with advantage to himself. If these acts are illegal and in restraint of trade, and if they constitute a monopoly under this act, it may well be denominated an act to restrain legitimate enterprise, and limit and qualify the ownership in property. The acts charged are common and frequent to many branches of manufacture and trade, and if the defendants are guilty in the manner of making sales of their products, as set forth in the indictment, the act is more sweeping in its provisions than ever contemplated by congress, as manifestly appears from the debates in the senate when the act was before it for consideration. From those debates it is evident that the congress did not intend to limit the amount of capital a citizen [212] should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not, by illegal contracts

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or devices, restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill, and experience of competitors. I am therefore of the opinion that as to the manner in which the defendants made the sales of their products, so far as their acts are set out in the indictment, there is no restraint of trade or monopoly shown, and there is no crime stated or charged. The indictment is therefore insufficient in charging a crime as to either the purchase and use of the distilleries or as to the sale of their products.

It was contended by counsel that, after these products reached the state of Massachusetts, they became property owned and held by the defendants under the laws of that state, and what was done with such products thereafter in that state did not in any way relate to commerce between the states, and therefore the act of congress could not be held to apply to such sales. It was further urged that, if congress intended to say that the acquisition of these distilleries, by purchase or lease, by the defendants, before the act was passed, was a crime, such act was unconstitutional, because *ex post facto* in its character. It was further contended that if congress meant to define as a monopoly—and therefore as a crime—the acquisition by the defendants of the large number of distilleries alleged in the indictment, when such ownership or control was lawful in the states where they were so owned, then congress exceeded its powers, and such act is void. But I have not deemed it necessary to pass upon these questions. I have carefully considered all the acts and unlawful combinations set forth in the indictment in the first, third, and fourth counts, and, for the reasons hereinbefore stated, I am satisfied they are insufficient to make out the crime covered by the first section of the act, viz., a combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states; and giving to the word “monopoly” its common-law meaning, which is the meaning congress clearly intended, I find the allegations in the second count insufficient to make out the crime covered by the second section of the act, viz., a combination or con-

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spiracy to monopolize any part of the trade or commerce between the states.

In reaching this conclusion, I am relieved to know that if I am in error the government can speedily protect the public from this alleged monopoly by a civil proceeding in any district in the United States in which the defendants transact their business. The act of congress wisely made special provision for just such civil suits, and conferred jurisdiction upon the circuit courts of the United States to enjoin parties from carrying on any monopoly or business in restraint of trade. The district attorneys of the United States, by permission of the attorney general, may institute such proceedings in equity in any district where proper service of process can be obtained upon any of the defendants, and provisions are made for speeding such cases to an early hearing. A suit of this nature was lately instituted in the United States circuit court [213] at Nashville, Tenn., by the United States through its district attorney, and against an illegal coal monopoly, doing business under a combination clearly differing from this case, and manifestly illegal; and that company was enjoined from doing business, and the public in that suit protected against the high prices in coal which resulted from a contract held illegal under this act. If, therefore, the attorney general of the United States should deem it proper to further test the question of whether the business of the defendants in this case is a monopoly, or in restraint of trade, he may authorize such a civil proceeding to be instituted, and by such suit speedily secure an adjudication from the circuit courts as to the effect and scope of this act. Inasmuch as these defendants were legally engaged in this extended business before the act of congress was passed, it would be fair and proper to proceed against them first by such civil suit. The public would be better protected, and more promptly benefited, by such proceeding, because it could be speedily heard, and relief be effectually granted, by an injunction restraining such business, and destroying the monopoly, if such the court should adjudge it to be. The warrant for removal will therefore be denied, and the defendants discharged from further custody.

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IN RE TERRELL.

UNITED STATES *v.* GREENHUT ET AL.

(Circuit Court, S. D. New York. June 28, 1892.)

[51 Fed., 213.]

CRIMINAL LAW—HABEAS CORPUS—JURISDICTION OF CIRCUIT COURTS—REMOVAL OF PRISONER.—Where a prisoner, arrested under warrant based upon an indictment in a distant state and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has authority on *habeas corpus* to examine such indictment, and to release the prisoner, if in its judgment the indictment should be quashed on demurrer.^a

ILLEGAL COMBINATIONS—CONTRACTS IN RESTRAINT OF TRADE—INDICTMENT.—An indictment under the act of July 2, 1890, relating to monopolies, averred in the fourth count that defendants, in pursuance of a combination to restrain trade in distillery products between the states, shipped certain whisky to Massachusetts, and sold it there through their distributing agents to dealers under a contract whereby said dealers were promised a rebate of five cents per gallon on their purchases, providing such dealers purchased their distillery products exclusively from the distributing agents, and sold them no lower than the prescribed list prices; said rebate to be paid when such dealers should sign a certificate that they had so purchased and sold for six months; and that by this means defendants had controlled and increased the price of distillery products in Massachusetts. *Held*, that no crime was charged with respect to such sales, since there was no averment of any contract whereby the dealers bound themselves not to purchase from others, or not to sell at less than list prices. *In re Corning*, 51 Fed. Rep. 205, approved.

Petition by Herbert L. Terrell for a writ of *habeas corpus*. Prisoner discharged.

Thos. Thacher and *Elihu Root*, for petitioner.

[214] *Edward Mitchell*, Dist. Atty., and *Maxwell Evarts*, Assist. Dist. Atty., for the United States.

LACOMBE, Circuit Judge.

The petitioner was arrested in this district upon a warrant issued by a United States commissioner here. The warrant was based upon an affidavit, which was itself based solely

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upon the fourth count in an indictment found by the grand jury in the district court of the United States for the district of Massachusetts. The petitioner being in custody of the United States marshal to await the order of the district judge, under Rev. St. § 1014, for his removal to the district of Massachusetts, writs of *habeas corpus* and *certiorari* were issued, to which returns have been made. It is not disputed by the district attorney that it is not only the right, but the duty, of the district court, before ordering removal, to look into the indictment, so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge whose decision is thus reviewed, or under the warrant of the commissioner to await the action of the district judge. The later decisions of the circuit courts abundantly establish this proposition. *In re Buell*, 3 Dill. 116; *In re Doig*, 4 Fed. Rep. 193; *U. S. v. Brawner*, 7 Fed. Rep. 86; *U. S. v. Rogers*, 23 Fed. Rep. 658; *U. S. v. Fowkes*, 49 Fed. Rep. 50. This practice was followed in *Re Palliser*, 136 U. S. 257, 10 Sup. Ct. Rep. 1034, and approved by the supreme court in *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending. Nor should the mere novelty of the points raised be held to preclude the court, before which comes the question of removal, from passing upon them, when it has no doubt as to how it

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would pass upon them if the cause were pending before it. If the questions are of such a character that it is thought desirable that the opinion of an appellate court should be obtained, such a proceeding as this is the more appropriate way in which to raise them, for a decision here adverse to the government is reviewable by appeal; but a similar decision on the trial is final, as the government cannot appeal from a criminal judgment. *U. S. v. Sanges*, 144 U. S. 310, 12 Sup. Ct. Rep. 609.

[215] The points of law arising upon this indictment were all carefully considered by Judge Ricks in his opinion (filed June 11, 1892, N. Dist. Ohio) on application for a removal in *Re Corning*, 51 Fed. Rep. 205. In that opinion I entirely concur; and the district attorney, apparently admitting its application, has discussed only the questions arising under the fourth count, urging that the learned judge did not fully apprehend the averments of that count, and therefore erred in holding that no contract was averred by which the dealers obligated themselves to purchase exclusively from defendants, and to sell at the prices defendants fixed. It is insisted that the paper set out in the fourth count became a contract on May 7, 1892, when the purchasers signed it, and that it is distinctly charged that defendants made such contract "in restraint of trade and commerce among the several states" on May 7, 1892. But, though it be conceded that the contract set forth in the indictment was made on that day, it does not follow that it was a contract in restraint of trade. The only trade which it is pretended was at all curtailed or affected in any way was the trade of Kelly & Durkee in distillery products between September 23, 1891, and May 7, 1892. During that period they bought such products only from certain named dealers in a limited number of states, and sold only at prices fixed by the defendants; but they did so only because they chose to,—because the offer of a rebate to purchasers who would thus conduct their business was an inducement operating upon their self-interest. No obligation of any kind constrained them so to do; during that entire period, certainly, no contract restrained them, for there was no contract in existence. They were entirely free to buy from whom they pleased, and to

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sell at any price they chose. The statute does not prohibit the offering of special inducements to such purchasers as shall make all their purchases from a single concern, and shall sell only at the prices fixed by it, even though those inducements be so favorable as to accomplish their object. It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade, of a contract which restrains or is intended to restrain trade. It is difficult to understand upon what principle it can be contended that trade is restrained by a contract, when no contract exists. That, when the trade in distillery products which Kelly & Durkee carried on between September 16, 1891, and May 7, 1892, was restrained, (if restrained it were,) there was no contract in existence, is conclusively admitted on the face of the indictment itself, which charges the statutory offense, to wit, the making of a contract, etc., as committed on May 7, 1892. The petitioner should be discharged.

[272] BISHOP v. AMERICAN PRESERVERS' CO.
ET AL.^a

(Circuit Court, N. D. Illinois. June 8, 1892.)

[51 Fed., 272.]

CONTRACTS IN RESTRAINT OF TRADE—TRUST COMBINATIONS.—Act Cong. July 2, 1890, (26 St. at Large, p. 209,) which forbids combinations in restraint of interstate commerce, and gives a right of action to any person injured by acts in violation of its provisions, does not authorize suit where the only cause of action is the bringing of two suits which have not been decided.^b

SAME—PLEADING.—A declaration in such an action which does not aver that the goods manufactured by plaintiff, and in respect of which he claims to be injured, are a subject of interstate commerce, or that the acts complained of have anything to do with any contract in restraint of trade, or that the parties are citizens of different states, is demurrable.

At Law. On demurrer to declaration.

Action by Andrew D. Bishop against the American Pre-

^a See also vol. 2, p. 51 (105 Fed., 845).

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servers' Company, Bernard E. Ryan, and T. E. Dougherty, for injuries alleged to have been sustained in his business and property by reason of acts of the defendants in violation of the "Anti-Trust Law," (26 St. at Large, p. 209.) That act makes illegal all combinations "in restraint of trade or commerce among the several states," and provides that "any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor, and recover threefold damages."

Lyndon Evans and Frederick Ornd, for plaintiff.

Kraus, Mayer & Stein, for defendants.

BLODGETT, District Judge, (orally.)

This suit is now before the court on a demurrer to the declaration by the defendants, the American Preservers' Company, Bernard E. Ryan, and T. E. Dougherty.

Plaintiff charges that in 1888 he was engaged in the business of man- [273] ufacturing fruit butter, jellies, preserves, etc., in the city of Chicago, and that, at the instance of others engaged in the same business, he entered into an agreement with them for the formation of a trust or combination for the purpose of advancing and maintaining the prices of such goods, and that a trust or combination called the "American Preservers' Trust" was organized for that purpose, of which plaintiff became a member, and to which he conveyed his property and plant which he had used in said business; that afterwards the managers of the organization decided to take in more manufacturers and their property, and adopt the form of organizing under a charter granted under the laws of West Virginia for the purpose of conducting the business of said trust, and that he assigned and transferred his property used in said business to the said company, the American Preservers' Company, one of the defendants herein; that, after he had so transferred his property to the said trust and company, differences arose between himself and the managers of said trust, and the said trust known as the "American Preservers' Company" brought a suit of replevin in one of the courts of the city of Chicago, and took possession of the property and plant, books, etc., which plaintiff had used

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in the management of his business in connection with said trust, and that said defendant, the American Preservers' Company, has also brought suit at law in this court against plaintiff, claiming to recover the sum of \$3,000. This is the substance of the declaration.

It is sufficient for the purposes of this demurrer to say:

1. This declaration does not show that the suits complained of are yet decided. It may on trial be shown and decided that the defendant has the right to maintain both these actions against plaintiff.

2. As a rule an action at law cannot be maintained for bringing even a false and fictitious action against a person. The commencement of a suit at law is an assertion of the right in a manner provided by law, and persons so commencing suits cannot be subjected to other actions or penalties by reason of their having done so, or for asserting or prosecuting what they claim as a legal right. The remedy of the party so sued is in defending the suit, and, if he is successful in his defense, he recovers costs, and sometimes damages. . *Gorton v. Brown*, 27 Ill. 489; *Speer v. Skinner*, 35 Ill. 282; *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N. W. Rep. 870.

It is clear from the allegations in this declaration that the plaintiff has attempted to bring this suit under the provisions of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, (26 St. p. 209.) But the injuries complained of are not such as give a right of action under this statute. Although this defendant, the American Preservers' Company, may be an illegal organization, it may have a valid right in the property replevied, as against plaintiff, and the right to sue and collect the \$3,000 for which suit is brought. If, from difficulties growing out of the organization and management of the alleged trust, an altercation and quarrel had ensued between plaintiff and the other members or officers of the trust, and plaintiff had been assaulted by the persons he was so associ- [274] ated with, it is very clear he would have had no right of action under this statute. Further, it is not averred in the declaration that the goods manufactured by plaintiff are a subject of interstate commerce.

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Neither does it appear that the suits complained of had anything to do with the alleged contract in restraint of trade. Certainly, as it seems to me, until the decision of the suits complained of, plaintiff has sustained no damage for which he cannot be adequately compensated by the costs and damages to be awarded in the determination of those cases, if it shall be held there was no right of action. Can a party to an illegal contract bring suit? *Miller v. Ammon*, 12 Sup. Ct. Rep. 884, (decided by the supreme court May 16, 1892.) Do not deem it necessary to pass on that question at this time. The declaration is also fatally defective in not averring the citizenship of the parties to be such as gives this court jurisdiction. The demurrer is sustained.

[819] STRAIT ET AL. v. NATIONAL HARROW CO.*

(Circuit Court, N. D. New York. August 10, 1892.)

[51 Fed., 819.]

PATENTS FOR INVENTIONS—ENJOINING SUITS FOR INFRINGEMENT—MONOPOLIES.—The fact that a corporation owning letters patent upon a particular kind of machinery has entered into a combination with other manufacturers thereof to secure a monopoly in its manufacture and sale, and to that end has acquired all the rights of other manufacturers for the exclusive sale and manufacture of such machines under patents, will not entitle a stranger to the combination to enjoin the corporation from bringing any suits for infringement against him or his customers.^b

In Equity. Suit by William Strait and others against the National Harrow Company for an injunction to restrain actions and suits for infringement of patents. On demurrer to the bill. Sustained.

Frederick Collin, for plaintiffs.

Edward H. Risley, for defendant.

WALLACE, Circuit Judge.

This is a suit wherein the relief demanded is a permanent injunction to restrain the defendant from instituting or prosecuting any action in any court of law or equity against the

* Not decided under the anti-trust law, but occasionally cited and commented upon.

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plaintiffs for the infringement of any letters patent owned by the defendant covering improvements in spring-tooth harrows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs. The defendant has demurred to the complaint. In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may [820] be an odious and wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of, the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. "The exercise of the legal right cannot be affected by the motive which controls it." *Kiff v. Youmans*, 86 N. Y. 329.

The complaint alleges that the plaintiffs, and the other persons threatened with suit, do not infringe any of the patents of the defendant; but, as was said by Mr. Justice HUNT, in *Celluloid Manufg Co. v. Goodyear Dental Vulcanite Co.*, 13 Blatchf. 384:

"To allow the action is to reverse the proper position of the parties. Whoever receives letters patent from the United States received thereby a *prima facie* right to maintain an action against every infringer of the right given by such letters. While it is true that such right is *prima facie* only, and that the holder must be prepared to maintain it in the courts when attacked, it is still a

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right on his part to sue such alleged violators. The present action would convert the right to sue into a liability to be sued, which is quite a different thing. * * * The defendant has a right of action against each one of these individuals. It has the right to sue the whole of them. It has the right to sue any one of them, and to allow the others to go undisturbed. While it would not be a high-minded theory, I know of no principle that, as a matter of law, would prevent its seeking the feeblest of them all,—the one least able to defend himself,—and to make a victim of him. If that individual shall appear to have infringed upon this defendant's patents, he is liable to the damages, although he may be poor,—unable to defend himself,—although others may have offended in a greater degree, and although we may condemn the spirit which selected him as the particular defendant. On principle this cannot be doubted."

See, also, *Asbestos Felting Co. v. United States & F. Salamander Felting Co.*, 13 Blatchf. 453; *Tuttle v. Matthews*, 28 Fed. Rep. 98; *Kelley v. Manufacturing Co.*, 44 Fed. Rep. 19; *Chemical Works v. Hecker*, 11 Blatchf. 552.

If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights, founded upon the combination agreement, then it might become pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. But in a suit brought for the infringement of a patent by the owner, any such inquiry, at the behest of the infringer, would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an obnoxious person or a criminal; and it is no [821] defense to the trespass upon it, unless it was removed or destroyed in the suppression of a nuisance, that it was used in carrying on the unlawful occupation. *Ely v. Supervisors*, 36 N. Y. 297.

The demurrer is sustained.

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IN RE GREENE.

(Circuit Court, S. D. Ohio, W. D. August 4, 1892.)

[52 Fed., 104.]

HABEAS CORPUS—PRISONER HELD FOR REMOVAL TO ANOTHER DISTRICT—INDICTMENT.—On *habeas corpus* to release a person held under a warrant of a United States commissioner to await an order of the

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district judge for his removal to another district to answer an indictment, it is the right and duty of the circuit court to examine the indictment to ascertain whether it charges any offense against the United States, or whether the offense comes within the jurisdiction of the court in which the indictment is pending.*

CRIMINAL LAW—OFFENSES AGAINST UNITED STATES—COMMON-LAW DEFINITIONS.—There are no common-law offenses against the United States, and the offenses cognizable in the federal courts are only such as the federal statutes define, provide a punishment for, and confer jurisdiction to try; but when congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it.

SAME—MONOPOLIES—INDICTMENT.—Under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be tested by the specific facts alleged to have been done or committed.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MONOPOLIES.—Congress has no authority, under the commerce clause or any other provision of the constitution, to limit the right of a corporation created by a state in the acquisition, control, and disposition of property in the several states and it is immaterial that such property, or the products thereof, may become the subjects of interstate commerce; and it is apparent that by the act of July 2, 1890, in relation to monopolies, congress did not intend to declare that the acquisition by a state corporation of so large a part of any species of property as to enable the owners to control the traffic therein among the several states, constituted a criminal offense.

MONOPOLIES—RESTRAINT OF TRADE.—To constitute the offense of "monopolizing, or attempting to monopolize," trade or commerce among the states, within the meaning of section 2 of said act, it is necessary to acquire, or attempt to acquire, an exclusive right in such commerce by means which will prevent others from engaging therein.

SAME—INDICTMENT.—In an indictment under section 1 of the act of July 2, 1890, to protect trade and commerce against monopolies, one count alleged, in substance, that on a specified date defendants, under the guise of the Distilling & Cattle Feeding Company, sold to certain persons in Boston a quantity of alcohol, then in Illinois, and that, by reason of the fact that said company controlled the manufacture and sale of 75 per cent. of all distillery products in the United States, defendants fixed the price at which the purchasers

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should and did sell such alcohol, and "did compel" said purchasers "to sell said alcohol at no less price than that fixed" by them, but there were no allegations as to the means of compulsion. *Held*, that it could not be assumed from these allegations that the means used was a contract with the purchasers, and the count was bad, as being too vague to charge any contract or restraint of trade between the states.

SAME—RESTRAINT OF TRADE—WHAT CONSTITUTES.—An arrangement whereby the said company promised persons who purchased from its distributing agents that if, for the ensuing six months, they would purchase their distillery products exclusively from such agents, and would not resell the same at prices less than those fixed by the company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases, did not constitute a contract in restraint of trade, within the meaning of section 1 of said act, since the purchaser was not in any way bound to the performance of the conditions named; nor did such arrangement operate to "monopolize," or "as an attempt to monopolize," trade and commerce, within the meaning of section 2 of said act.

SAME.—Nor was there any offense under the statute, even after the purchaser complied with the conditions of the promise, and thereby became entitled to the rebate, for such compliance had no retroactive effect to create a valid contract between the parties prior thereto.

SAME.—Even if the promise could be considered as a binding contract between the parties, the restraint thereby imposed was only partial and reasonable in the protection of defendant's business, and was not of the general character necessary to constitute an unlawful contract in restraint of trade. *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. pt. 1, p. 25, approved.

SAME—INDICTMENT OF STOCKHOLDERS FOR ACTS OF CORPORATION.—In indictments of individuals under the said statute, where all the acts alleged to constitute the offense are charged to have been done by a corporation, an omission to state what relation defendants bore to the corporation, other than that of stockholders, is fatal, since mere stockholders cannot be held criminally responsible for the acts of the corporation.

At Law. Petition by Louis H. Greene for a writ of *habeas corpus* to release him from the custody of the United States marshal, by whom he is held under a warrant of a United States commissioner, awaiting an order for his removal to the district of Massachusetts to answer an indictment for an alleged violation of the act of July 2, 1890, relating to monopolies. Prisoner discharged.

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John W. Herron, for the United States.

Ramsey, Maxwell & Ramsey, for Greene.

JACKSON, Circuit Judge.

The petitioner, a citizen and resident of Ohio, having been arrested and taken into the custody of the United [106] States marshal of this district upon a warrant of a United States commissioner, here to await an order of the judge of the district court, under section 1014 of the Revised Statutes, for his removal to the district of Massachusetts for trial upon an indictment found and pending therein against him and others for alleged violations of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," has applied to this court to be discharged from such custody, claiming that he is illegally restrained of his liberty; that said indictment against him in the district court of Massachusetts, on which his arrest and confinement is solely based, charges him with no offense against the United States under said act of July 2, 1890; and that said district court has no jurisdiction over either his person or the alleged offense on which it is sought to remove him there for trial.

It admits of no question that it is both the right and duty of this court, upon this application, to consider and determine whether the indictment pending against the petitioner in the district of Massachusetts charges either a criminal offense or one that comes within the jurisdiction of that court. It is well settled that upon application for an order of removal under section 1014, Rev. St., the district court or judge may properly look into the indictment to ascertain whether an offense against the United States is charged, and whether the court to which the accused is sought to be removed has jurisdiction of the same. In such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions. Such has been the uniform practice of the federal courts. *In re Buell*, 3 Dill. 116;

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In re Doig, 4 Fed. Rep. 193; *U. S. v. Brawner*, 7 Fed. Rep. 86; *U. S. v. Rogers*, 23 Fed. Rep. 658; *U. S. v. Fowkes*, 49 Fed. Rep. 50; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. These cases have recently been followed and approved by Judge Ricks in the case of *In re Corning*, (U. S. v. *Greenhut*,) 51 Fed. Rep. 205, and by Judge Lacombe in *Re Terrell*, (U. S. v. *Greenhut*,) 51 Fed. Rep. 213, upon removal proceedings under the same, or substantially the same, indictment as that pending against petitioner. In the *Terrell Case*, Judge Lacombe properly states that the same right and duty of looking into the indictment arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal issued by the district judge, whose decision is thus reviewed, or under the warrant of the commissioner, to await the action of the district judge.

It is insisted by the district attorney, on behalf of the United States, that if the indictment is insufficient it must be met by a motion to quash, or some other appropriate proceeding in the court in which it is pending, and whose action would be subject to review; and the case of *In re Lancaster*, 137 U. S. 393, 11 Sup. Ct. Rep. 117, is relied on to support his contention that under *habeas corpus* proceedings the sufficiency of the indictment should not be inquired into. We do not understand that [107] decision as laying down any such general proposition as claimed for it in cases like the present. In that case the petitioners, being in the custody of the United States marshal under an indictment pending against them in the circuit court for the southern district of Georgia, applied to the supreme court for leave to file in said court their petition for a writ of *habeas corpus*, upon the grounds that the matters and things set forth and charged against them in the indictment did not constitute any offense under the laws of the United States, or cognizable in the circuit court. "In this posture of the case," say the supreme court, "we must decline to interfere." In this case it appears that the circuit court in which the indictment was pending had taken jurisdiction, and had the petitioners by its direction in the custody of its marshal, and no reason was shown for not invoking the judgment of said court upon the sufficiency of the indictment. The supreme court, in declining

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to interfere, acted in accordance with its well-settled rule not to issue or grant a writ of *habeas corpus* in the exercise of its original jurisdiction, except when the inferior court is acting without jurisdiction, or is exceeding its power to the prejudice of the party seeking relief. *In re Lane*, 135 U. S. 446, 10 Sup. Ct. Rep. 760; *Ex parte Mirzan*, 119 U. S. 584-586, 7 Sup. Ct. Rep. 341. It certainly did not intend to lay down the proposition that no other court than that in which an indictment was pending could look into the sufficiency of such indictment, or pass upon the question whether it charged an offense, or was within the proper jurisdiction of such court; for in the more recent case of *Horner v. U. S.*, 143 U. S. 214, 12 Sup. Ct. Rep. 410, it is said:

"The district judge, in exercising his jurisdiction under section 1014, Rev. St., to issue a warrant for the removal of Horner to the southern district of Illinois, had a right to determine whether or not the offense was within the jurisdiction of the district court of the United States for that district, and that determination was reviewable by *habeas corpus*."

In the second case of *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. Rep. 522, no question of removal to another district was involved, nor had any indictment been found; but the petitioner was simply held to await the action of the grand jury, and prematurely sought to raise, by *habeas corpus* proceedings, the question under examination, whether any offense had been committed. The present proceeding is essentially different, and comes within the rule stated above by Judge Lacombe. If the indictment shows no offense committed against the United States in Massachusetts, the petitioner is unlawfully and illegally restrained of his liberty in being held in custody to await an order for his removal to that district for trial, and is entitled to the same measure of relief as though the removal had been ordered by the district judge. The right of the government to have the petitioner tried in the district of Massachusetts where the indictment is pending is not questioned if the case against him comes under section 731 of the Revised Statutes, providing that, "when any offense against the United States is begun in one judicial circuit, and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, deter- [108] mined,

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and punished in either district in the same manner as if it had been actually and wholly committed therein." There is, however, nothing in this provision of the law which deprives the court of the right and duty to look into the indictment to determine whether any offense against the United States is charged, and, if so, whether it was either begun or completed in the district of Massachusetts, so as to give the federal court there jurisdiction of the case. If, in cases like the present, the mere pendency of an indictment against a party in a state other than that of his domicile should be held to preclude all inquiry into the question whether he is charged with any offense against the United States, or whether the court wherein such indictment is pending has jurisdiction to try the accused, the rights of the citizen would be open to serious abuse. We are clearly of the opinion that the authorities establish a different rule, and we therefore proceed to the consideration of the indictment against the petitioner, to ascertain if any offense is charged against him, and, if so, whether the district court of Massachusetts has any jurisdiction in the premises.

The indictment is based upon alleged violations of sections 1 and 2 of the act of July 2, 1890, which read as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The indictment contains four counts. The 1st, 3d, and 4th allege violation of section 1, and the 2d count charges a violation of section 2. The 1st, 2d, and 3d counts recite, in the same general way, that on the 11th day of February, 1890, the petitioner and other associates, in the states of Ohio, Illinois, and New York, engaged with each other in a combination, in restraint of trade and commerce, in distillery

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products; that, for the purpose of restraining trade and commerce in said products among the several states of the United States, they, in the form and guise of a corporation known and designated as the Distilling & Cattle Feeding Company, which was on said 11th day of February, 1890, organized under the laws of Illinois, thereafter, and prior to August 1, 1890, obtained control, by purchase, renting, and leasing, 70 other distilleries within the United States used for the manufacture of said distilling products, which products were on February 11, 1890, and continuously thereafter, up to the finding of the indictment, "a subject of trade and commerce among the several states of the said United States;" that each of said distilleries were, at the respective dates of their purchase, renting, or leasing and running under said control, separate and distinct, and competing in the manufacture and sale of distilling products among the several states; that, in pursuance of said combination, they used, managed, and controlled all said distilleries, and by means thereof did, during the period last mentioned, manufacture and sell, and control the manufacture and sale, within the United States, of 77,000,000 gallons of said distillery products, said quantity being 75 per cent. of all the distillery products made and sold within and among the United States during said period; that the condition of trade and commerce in said products among the several states during said period was such that, by controlling the manufacture and sale of 75 per cent. of said distillery products, they were able to control and fix the price at which they would sell such products to dealers therein in the several states, and to control and fix the price at which such dealers should sell the same to citizens of the several states during said period; that by said means they intended to control the amount of said distillery products manufactured and sold among the several states, and to control and fix the price at which said distillery products should be sold by all dealers therein among the several states, and in the state of Massachusetts, and to prevent and counteract the effect of free competition in the usual price at which said products were sold among and within the several states, and to increase and augment the usual price thereof, and thereby exact and procure great sums of money from the citizens of

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Massachusetts and other states purchasing distillery products, and to secure to themselves exclusively the trade and commerce in said distillery products, and by all the means aforesaid unlawfully to restrain the trade and commerce in such products among the several states of the United States.

The first count then alleges that, in pursuance of said purpose and intent, they, under the form and guise of said Distilling & Cattle Feeding Company, on October 3, 1890, did at Boston, within the district of Massachusetts, "negotiate a sale, and did sell," to the firm of D. T. Mills & Co., 5,642.82 proof gallons of alcohol, which was then in the state of Illinois; that by reason of said combination, and of their control of the large number of distilleries and the manufacture of 75 per cent. of all such products in the United States, they did fix the price at which said D. T. Mills & Co., who were dealers therein at Boston, should and did sell said alcohol within said district of Massachusetts, or for transportation into any other state, "and did compel said Mills & Co. to sell said alcohol within said district of Massachusetts for use in said district, or for transportation to other states of the United States, at no less price than that fixed" by the accused; that by this means they controlled the amount of distilled products sold within the state of Massachusetts, and did fix the price at which said products were sold by dealers in said state; that they thereby prevented and counteracted the effect of free competition on the usual price at which said products were sold within the state, and did increase and augment the usual price at which said distillery products were sold in the state of Massachusetts for use therein or transportation therefrom, and that they thereby, and by the means aforesaid, did "re- [110] strain the trade and commerce in said distilling products between the state of Massachusetts and the states of the said United States other than the state of Massachusetts," contrary to the form of the statutes in such case made and provided.

The second count, based upon the second section of the act, after the aforesaid general recital, charges an unlawful attempt to monopolize the trade and commerce in distillery products under the form and guise of said Distilling & Cattle Feeding Company; and the specific acts therein alleged are

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that on September 18, 1890, C. I. Hood, of Lowell, Mass., purchased from Webb & Harrison, as distributing agents of the accused, 526.52 proof gallons of alcohol; that the defendant, in the form and guise of the aforesaid company, promised said Hood a rebate of five cents per gallon on the purchase price of said alcohol, upon condition that for six months from the date of the promise he should have bought his supply or supplies of distillery products exclusively from said company's agents, and should not have sold any of the products so purchased at less than the company's distributing agents' list prices, and should furnish evidence of compliance with those conditions in the form of a certificate. This count alleges a similar arrangement with Kelly and Durkee on the sale to them, September 23, 1890, by the company's distributing agents, of 85.54 proof gallons of alcohol. It also sets out a list of the distributing agents from whom purchases could be made, and the agreement of the company as to the five cents per gallon rebate, and the condition on which it would be made. It is alleged that, by means of said premises and terms of rebate to said purchasers, the accused, under the form and guise aforesaid, did attempt to monopolize to themselves the trade and commerce in said distillery products among the several states, in violation of law.

The third count is based upon the first section of the act. It alleges an agreement made by the aforesaid company with C. I. Hood, at Lowell, Mass., on the sale to him of 518.88 gallons of said company's products, made October 2, 1890, for a rebate upon the same terms and conditions as set forth in the second count, by which arrangement and promise it is charged that the accused "did attempt to execute and carry out the purpose and intent aforesaid to restrain the trade and commerce in said distillery products among the several states of the said United States, and especially between the state of Massachusetts and other states of the United States, against the peace," etc.

The fourth count is also founded upon section 1 of the act. It sets out a contract or agreement of the Distilling & Cattle Feeding Company with Kelly and Durkee, bearing date at Peoria, Ill., September 23, 1891, promising to pay the latter \$4.27 as a rebate of 5 cents per gallon on 85.54 proof gallons

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of the company products purchased that day, upon the same terms and conditions as alleged in the second and third counts; and then sets forth the certificate of said Kelly and Durkee that they had since the date of the agreement purchased all their supply of such goods as are produced by the Distilling & Cattle Feeding Company, exclusively from one or more of the dealers or distributing agents of the company, [111] of which a list is attached. This certificate bears date May 7, 1892, and it is charged that the purchaser's compliance with the terms and conditions on which the company promised to make or pay the 5 cents per gallon on rebate was a contract in restraint of trade and commerce, within the provisions of the statute.

In the consideration of this indictment it should be borne in mind that there are no common-law offenses against the United States; that the federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law; and that congress must define these crimes, fix their punishment, and confer the jurisdiction to try them. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Britton*, 108 U. S. 199-206, 2 Sup. Ct. Rep. 531.

When congress, under and in the exercise of powers conferred by the constitution, adopts or creates common-law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them. *U. S. v. Armstrong*, 2 Curt. 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198. The act of July 2, 1890, on which the present indictment is based, in declaring that contracts, combinations, and conspiracies in restraint of trade and commerce between the states and foreign countries were not only illegal, but should constitute criminal offenses against the United States, goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offenses, and creates a new crime, in making contracts in restraint of trade mis-

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demeanors, and indictable as such. But the act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmonds*, 96 U. S. 360; *U. S. v. Carl*, 105 U. S. 611; *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. Rep. 512; *U. S. v. Trumbull*, 46 Fed. Rep. 755.

Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several [112] states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused "engaged in a combination," or "made contracts in restraint" of such trade or commerce, or "monopolized" or "attempted to monopolize" the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: "Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth." *U. S. v. Cruikshank*, 92 U. S. 542, 563.

Do the particular facts set forth in the indictment consti-

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tute violation of the statute? In construing and applying the provisions of the act to the specific offenses charged, it must be assumed that congress did not intend to make the enactment either retroactive or give it an *ex post facto* operation and effect. No criminality can therefore be ascribed to the acts of the accused in respect to their recited combination on February 11, 1890, in restraint of trade and commerce in distillery products by means of the Distilling & Cattle Feeding Company, a corporation organized by them on that day under the laws of Illinois, and its acquisition and control prior to the passage of the act of July 2, 1890, of 70 other distilleries, which enabled said company to manufacture and sell 70,000,000 gallons of said distillery products, said quantity being 75 per cent. of all the distillery products manufactured and sold in the United States between the date or dates of acquiring said distilleries and the finding of the indictment. It is not alleged that this acquisition and control of the 70 other distilleries by the accused or by the Distilling & Cattle Feeding Company, by means of which this large production was secured, was in any respect unlawful; nor is it alleged, or even recited, that the parties from whom said 70 other distilleries were acquired, were by contract restrained from thereafter engaging in the distillery business, either generally or partially. From anything averred or recited to the contrary, it must be presumed, in this proceeding, that the defendants, or the Distilling & Cattle Feeding Company, in whose form and guise the accused is said to have acted, were in the rightful possession and control of the numerous distilleries employed by them in the manufacture of distilled products; and the quantity of such products, whether large or small, can in no way affect the right of disposition incident to lawful ownership. Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the

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states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several states or with foreign nations. Commerce among the states, within the exclusive regulating power of congress, "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S. 691-702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826. In the application of this comprehensive definition, it is settled by the decisions of the supreme court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or *situs* to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of congress attaches and continues, until it has reached another state, and

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become mingled with the general mass of property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517-520, 6 Sup. Ct. Rep. 475; *Robbins [114] v. Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. Rep. 592; and *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6. In the latter case the supreme court pointed out the distinction between commerce and the subjects thereof, and held that the manufacture of distilled spirits, even though they were intended for export to other states, was not commerce, falling within the regulating powers of congress.

Stripping the indictment of its verbiage,—its general recitals and conclusions of law,—does either count thereof charge any real offense against the United States over which the district court of Massachusetts has jurisdiction? The specific offense charged in the first count is that the defendants, under the form and guise of the Distilling & Cattle Feeding Company, sold on October 3, 1890, to Mills and Gaffield, copartners under the name of D. T. Mills & Co., a certain quantity of distilled products then in the state of Illinois; that, by reason of said Distilling & Cattle Feeding Company's controlling the manufacture and sale of 75 per cent. of all such products in the United States, they fixed the price at which said purchasers should and did sell said alcohol for use in Massachusetts, or for transportation into any other state, "and did compel said Mills and Gaffield, as copartners, to sell said alcohol at no less price than that fixed "

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by them. It is not alleged how said Boston purchasers were "compelled" to sell at the prices fixed by the defendants, nor how, or under what arrangement, the defendants fixed the price at which the alcohol should be sold in Massachusetts, or for transportation therefrom. Was it one of the provisions of the contract of sale and purchase, or was it by a combination or conspiracy between the defendants and the Boston purchasers? The means described by which the defendants were enabled to fix the price at which the purchasers should sell the alcohol was certainly not a "contract, combination, or conspiracy in restraint of trade and commerce among the states." If they, by force or duress, "compelled" the purchasers to sell at a price fixed by them, such compulsion would not constitute either a contract, combination, or conspiracy in restraint of trade. It cannot be assumed, under the language employed in this count, that there was any "contract" between the defendants and Mills and Gaffield which by its terms and provisions restrained the latter in respect to the price at which they should or did sell the alcohol. The count certainly charges no "combination or conspiracy," within the meaning of the act, between the defendants and the Boston purchasers. The charge is too vague and general to show a "contract" in restraint of trade, such as the first section of the act contemplates and declares illegal. It cannot be aided by presumption or intendments. It is bad upon its face, and charges no offense committed in the state of Massachusetts of which the United States courts in that state could take jurisdiction.

The second count charges an attempt on the part of defendants to monopolize to themselves, under the form and guise of said Distilling & Cattle Feeding Company, the trade and commerce in distillery products among the several states, and between the state of Massachusetts and other states; the special acts on which this charge is based being that, [115] on the purchase of certain quantities of alcohol by C. I. Hood, and Kelly & Durkee, (citizens and residents of Massachusetts,) in September, 1890, from certain distributing agents of the Distilling & Cattle Feeding Company, the defendants, under the form and guise of said company, agreed and promised that if said purchasers would, for a certain designated

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period, (six months,) buy all their supply or supplies of distillery products exclusively from said company's distributing agents, (two of whom, as appears in the count, were located at Boston, Mass.,) and would not sell the alcohol or other distillery products so purchased at any lower prices than the list prices of such distributing agents, and would make a proper certificate of such facts, then the said Distilling & Cattle Feeding Company would make and pay to said purchasers a rebate of five cents per gallon on each gallon purchased by them. The third and fourth counts set out substantially the same arrangement and agreement as to the payment of a rebate of five cents per gallon upon the purchasers' compliance, during the period stated, with the aforesaid terms and conditions, and charge the same to have been contracts in restraint of trade and commerce among the states, within the purview of the statute. We may therefore consider those three counts together. Do the facts therein set forth constitute either an "attempt to monopolize" trade and commerce in distillery products among the states, or contracts in restraint of such trade? It is not very clear what congress meant by the second section of the act of July 2, 1890, in declaring it a misdemeanor to "monopolize," or "attempt to monopolize," any part of the trade or commerce among the states or with foreign nations. It is very certain that congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and

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developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.

A "monopoly," in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more [116] individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone, (4 Bl. Comm. 159,) and by Lord Coke, (3 Co. Inst. 181,) it is a grant from the sovereign power of the state by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the act was under consideration in the senate, distinguished members of its judiciary committee and lawyers of great ability explained what they understood the term "monopoly" to mean; one of them saying: "It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." Another senator defined the term in the language of Webster's Dictionary: "To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade." It will be noticed that, in all the foregoing definitions of "monopoly," there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an "attempt to monopolize" any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or com-

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merce by means which prevent or restrain others from engaging therein. It was certainly not a "monopoly," in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to own 70 distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the 70 distilleries, which enabled the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products, by the enlargement and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration.

Was the arrangement with the Boston purchasers, as to making them a rebate upon the conditions stated, an attempt to monopolize any part of the trade and commerce among the states in distillery products? It is not alleged, nor is it to be inferred from anything that is set forth, that said purchasers bound themselves, or entered into any contractual [117] obligations or understanding, to buy their distillery supplies exclusively from the distributing agents of said Distilling & Cattle Feeding Company. They were left at perfect liberty to purchase when, where, or from whom they pleased. No contractual or other restraint was placed upon them. Upon certain conditions, which it was entirely optional with them to comply with or disregard, a rebate was promised by the seller. Such an arrangement does not amount to a contract to purchase exclusively from said distilling company or its distributing agents. But, suppose it did, there was nothing in such an agreement unlawful or in

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contravention of the statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an "attempt to monopolize," when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements. As to the remaining condition upon which the rebate was to be payable, the same observation may be made. The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell. They were simply offered a rebate, as an inducement not to undersell the vendor's distributing agents, two of whom were located at Boston, Mass. The arrangement relied on, considered either in detail or as a whole, involved no "attempt to monopolize any part of the trade or commerce among the states." The rebate promised, upon condition of exclusive purchases and not underselling the vendor's distributing agents, was a legitimate method of inducing trade; but the means thus employed in no way operated to prevent or restrain others from offering the same, or greater, inducements. The condition as to not selling at lower prices than those of the distributing agents may have had a tendency to maintain prices, but that would not have been an attempt to monopolize trade. The inducements offered for the exclusive trade, and to sell at no lower prices than the price list of the distributing agents, was not prejudicial to the public. It was in no way contrary to public policy, or an unlawful restraint of trade, as will be seen from the authorities hereinafter referred to. But, aside from this, it is not shown that said arrangement necessarily involved or related to interstate traffic. It is not alleged that Webb & Harrison, the distributing agents, from whom Hood and Kelly and Durkee made their purchases of alcohol, were located or made such sales in some other state than Massachusetts; nor that the alcohol itself was beyond the limits of that state when purchased. Neither is it shown that the exclusive purchases thereafter to be made, as one of the conditions on which the rebate was to be paid, could not have been made in the state of Massachusetts, it appearing from the face of the count that two of such distributing agents were located at Boston, in said state. Without dwell-

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ing further upon its consideration, we are clearly of the opinion that this second count fails to charge any offense against the petitioner.

What has been already said applies largely to the third and fourth counts. The matter of the promised rebate upon the same conditions as set forth in the second count, which is charged to have been a con- [118] tract in restraint of trade and commerce among the states, and between the state of Massachusetts and other states, does not constitute any offense against the United States, or in any way contravene the first section of the act of July 2, 1890, because there was actually no contract which bound, or attempted to bind, the Massachusetts purchasers of alcohol, as to where or from whom they would make further purchases during the period stated, nor as to the price or prices at which they should sell. They were simply offered an inducement in respect to those matters, which they were at perfect liberty to comply with or decline. They were not restrained by any contractual obligation during the stipulated period. The agreement was wholly unilateral during that period. Upon compliance with the conditions as alleged in the fourth count, they were entitled to the rebate; but such compliance had no retroactive operation to create a valid and subsisting contract between the parties prior thereto, or during the period intervening between the date of the promise and the full compliance with the conditions on which the rebate was to be paid. During that period there was between the parties no contract in restraint of trade. But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it could not be held to be a contract in restraint of trade. It is not deemed necessary to review the authorities upon the subject of contracts in restraint of trade, nor would it be at all profitable. It is well settled that contracts in general restraint of trade are contrary to public policy, and therefore unlawful. The arrangement under consideration cannot possibly be considered as one in general restraint of trade. Where the restraint is partial, either as to time or place, its validity is

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to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. No precise boundary can be laid down as to when, and under what circumstances, the restraint would be reasonable, and when it would be excessive. *Navigation Co. v. Winsor*, 20 Wall. 64-68; *Beal v. Chase*, 31 Mich. 490; *Ward v. Byrne*, 5 Mees. & W. 549; *Horner v. Graves*, 7 Bing. 735; *Mallan v. May*, 11 Mees. & W. 667; *Whittaker v. Howe*, 3 Beav. 383; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. Rep. 335. In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business. It was not an unlawful contract in restraint of trade. The authorities fully support this conclusion. In addition to those referred to above, we cite the following: *Brown v. Rounsavell*, 78 Ill. 589; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Chicago, etc., R. Co. v. Pullman South. Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. pt. 1, p. 25, (decided by the house of lords in December, 1891.) In this latter case there was a combination or association of ship owners who, being engaged in the trade with China, with a view of obtaining a monopoly of the homeward tea trade and ex- [119] cluding the plaintiffs from competing with them for the same, and thereby keep up freight, offered to rebate or repay every sixth month, to such merchants and shippers in China as should have shipped their tea exclusively in vessels of the association, 5 per cent. on all freight paid by them. The plaintiffs, as rival and competing ship owners, were thereby excluded from this business, and sued for damages, and the question (almost identical with that under consideration) was presented whether the combination and arrangement adopted by the association to secure the exclusive transportation of tea trade was in any way unlawful. It was first passed upon, and held to be free from objection, by Lord Coleridge. 21 Q. B. Div. 554, 4 Ry. & Corp. Law J. 611. His decision was sustained on appeal, (23 Q. B.

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Div. 598, 7 Ry. & Corp. Law J. 223,) and was finally affirmed by the house of lords. It would be highly instructive to quote at length from the opinions delivered in the house of lords, if the limits of this opinion permitted. The reasoning and conclusions there reached fully sustain our conclusions in the present case.

But there is another and fatal objection to all the counts of this indictment. All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distilling & Cattle Feeding Company, a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. By the eighth section of the statute, it is provided "that the word 'person' or 'persons' wherever used in that act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." If the acts charged constitute criminal offenses, the Distilling & Cattle Feeding Company is the "person" who has committed the same. It would be unheard of in criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law, without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses, there is no criminality by representation. We have not deemed it necessary or proper to attempt the difficult task of defining the cases to which the statute will apply. The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations, which the state courts have in most instances declared illegal. The conclusion of the court is that the petitioner, Lewis H. Greene should be discharged, and it is accordingly so ordered and adjudged.

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[646] UNITED STATES v. NELSON ET AL.

(District Court, D. Minnesota. October 10, 1892.)

[52 Fed., 646.]

MONOPOLIES—SUFFICIENCY OF INDICTMENT—WORDS OF STATUTE.—An indictment under the act of congress, “to protect trade and commerce against unlawful restraint and monopolies,” (26 St. at Large, p. 209,) must contain a certain description of the offense, and a statement of facts constituting same, and it is not sufficient simply to follow the language of the statute.*

SAME—WHAT CONSTITUTES—AGREEMENT TO RAISE PRICE.—An agreement between a number of lumber dealers to raise the price of lumber 50 cents per thousand feet, in advance of the market price, cannot operate as a restraint upon trade, within the meaning of the act of congress, “to protect trade and commerce against unlawful restraint and monopolies,” (26 St. at Large, p. 209,) unless such agreement involves an absorption of the entire traffic, and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion.

At Law. Indictment under the act of July 2, 1890, (26 St. at Large, p. 209,) “to protect trade and commerce against unlawful restraints and monopolies.” Demurrer to all the counts sustained.

The United States District Attorney.

W. E. Hale, for defendants.

NELSON, District Judge.

In the case of *United States v. Benjamin F. Nelson, Sumner T. McKnight, William H. H. Day, et al.*, a demurrer is interposed to the indictment. Pressure of business in court has prevented an earlier decision, and I can now only give my reasons briefly for sustaining the demurrer. The indictment intends to charge offenses under the act of congress entitled “An act to protect trade and commerce against unlawful restraints and monopolies.” This statute declares contracts, combinations in the form of trusts or otherwise, and monopolies to restrain trade or commerce among the

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several states and foreign nations, illegal, and makes them offenses, and affixes the punishment. The indictment purports to charge the defendants with violating the law by entering into a contract, and unlawfully engaging in a combination in the form of a trust, and confederating together in a conspiracy in restraint of trade among the several states. There are 12 counts in the indictment. The first 6 counts charge the offense in the language of the statute, and the others set forth facts which are claimed to constitute the offense. The federal courts by this act are given jurisdiction to apply remedies in cases where interstate commerce is injuriously affected by combinations and contracts which the state courts had formerly applied to protect local interests. In order to administer the law, the court must determine what is an unreasonable and unlawful restraint of trade or commerce by contracts, trusts, and conspiracies, and whether a contract is injurious to the public. In all cases at common law, it must be made to appear that the acts complained of threatened the interests of the public, and this is true whether the remedy sought to be applied is by civil or criminal proceedings. It is urged by the district attorney that, the offense being statutory, the general rule in such cases, to wit, [647] that it is sufficient to allege the offense in the language of the statute, will sustain the first six counts. I cannot agree to that. This is not a case where every fact necessary to constitute the offense is charged, or necessarily implied, by following the words of the statute; and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense; and it is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offense only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality and charge the accused with a substantial offense. See *U. S. v. Cruikshank*, 92 U. S. 558. The charge must contain a statement of facts constituting the offense, and a certain description of it, which this indictment does not in either of the first six counts, and they cannot be sustained.

Do the facts set forth in the last six counts describe an offense which the statute forbids? The first of these counts

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charges, in substance, that the defendants were each dealers in lumber in the United States, and each transacted business at numerous towns and cities in different states, and on September 7th, at the city of Minneapolis, they agreed together that they would raise the price of lumber 50 cents per thousand feet in advance of the market price of pine lumber in the states of Wisconsin, Minnesota, Iowa, Illinois, and Missouri, and in pursuance of such agreement they did then and there raise the price of pine lumber 50 cents per thousand feet in each of said states in which they transacted business. How this advance in price by these parties in the several states mentioned could regulate thereby the price for all dealers is not set forth. It appears that the idea of the pleader was that a mutual agreement between several dealers that they would raise the price of the lumber owned or manufactured by themselves 50 cents per thousand feet above the market price necessarily advanced the price of all the pine lumber for sale in those states to that extent, and none could be purchased for a less price. While it may be true that some of the other dealers might attempt to induce purchasers to be governed by the price fixed in their locality by the parties to the agreement, and try to keep up prices, yet competition in the commodity would soon bring the price down, unless there were fraudulent or coercive means resorted to for the purpose of restraining other dealers, and preventing them from exercising their own judgment as to prices.

An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least. What has been said in regard to this count applies to the remaining five, in which [648] wrongful combinations and conspiracies in restraint of trade are alleged, and a monopoly of the whole or a part of the

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trade and commerce in lumber in the several states mentioned. The allegations are too indefinite and uncertain, and the demurrer to all the counts is sustained.

**[440] UNITED STATES v. TRANS-MISSOURI
FREIGHT ASS'N ET AL.***

(Circuit Court, D. Kansas. November 28, 1892.)

[53 Fed., 440.]

CARRIERS—COMBINATIONS TO MAINTAIN RATES.—An agreement between several competing railway companies, and the formation of an association thereunder, for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination, or conspiracy in restraint of trade in violation of the act of July 2, 1890, § 1.^b

SAME—MONOPOLIES.—Nor is such an agreement in violation of section 2 of such act, as tending to the monopolization of trade and commerce.

SAME—PUBLIC POLICY—TRANSFER OF FRANCHISE.—Where each company, by such agreement, maintains its own organization as before, elects its own officers, delegates no powers to the association to govern in any respect the operations or methods of transacting the routine [441] business of the several competing lines, but simply requires that each company shall charge just and reasonable rates, and provides for certain regulations in regard to changes in such rates, such contract or agreement is not forbidden by public policy as amounting to a transfer of the franchises and corporate powers of such companies.

SAME—MONOPOLIES—INTERSTATE COMMERCE ACT.—It was not the intention of congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade.

In Equity. Bill by the United States against the Trans-Missouri Freight Association, the Atchison, Topeka & Santa

* Affirmed by the Circuit Court of Appeals, Eighth Circuit (58 Fed., 58). See p. 188. Reversed by the Supreme Court (166 U. S., 290). See p. 648.

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Fe Railroad Company, and others, for the dissolution of an association or combination alleged to be in restraint of trade in violation of the act of July 2, 1890, and for an injunction restraining the several companies from carrying into effect the agreement under which the association was formed. Bill dismissed.

J. W. Ady and *S. R. Peters*, for complainant.

George R. Peck, B. P. Waggener, Wolcott & Vaile, Wallace Pratt, J. P. Dana, Spencer, Burnes & Mosman, J. D. Strong, W. F. Guthrie, J. M. Thurston, A. L. Williams, N. H. Loomis, R. W. Blair, John R. Hawley, W. F. Evans, M. A. Low, James Hagerman, and T. N. Sedgwick, for defendants.

RIVER, District Judge.

This is a bill in equity, brought by the United States attorney for the district of Kansas, by direction of the attorney general, in the name of the United States against the Trans-Missouri Freight Association and 18 railway companies, which, it is alleged in the bill, constitute the association.

The object and purpose of the bill is to obtain a decree declaring said freight association dissolved, and enjoining defendants, and each of them, from carrying out the terms of a certain memorandum of agreement entered into by and between the 18 railway companies forming this association, which agreement, it is alleged, is unlawful, because maintained by said railway companies in violation of an act of congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.

It is alleged in the bill that the defendants (the 18 railway companies) are common carriers incorporated under public statutes of several states and of the United States, and are engaged in moving, carrying, and transporting freight and commodities in the commerce, trade, and traffic which is continuously carried on among and between the several states of the United States, and among and between the several states and territories of the United States, and between the

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states and territories of the United States and foreign countries; and that prior to March 15, 1889, each of the defendant railway companies owned, operated, and controlled separate lines of railroad, and furnished to persons engaged in trade and others, among the states and territories of the United States, separate, distinct, and competing lines of transportation between the states and territories of the United States lying west of the Mis- [442] souri river and east of the Pacific ocean, and that to encourage and secure the benefit of the competing lines of transportation throughout that region of country the government of the United States and the states and territories within the region just mentioned had granted to the defendants public franchises, land grants, securities, and subsidies of great value. That on the 15th day of March, 1889, the defendant railway companies, not being content with the rates of freight they could receive with free competition among themselves, but contriving and intending unjustly and oppressively to establish and maintain arbitrary rates of freight and transportation in the interstate commerce throughout said region, did combine, conspire, confederate, and unlawfully agree together, and did enter into a written agreement and contract, known as the "Memorandum of Agreement of the Trans-Missouri Freight Association," by the terms of which said agreement the association has control of all competitive traffic between points in that region of country lying west of a line commencing at the ninety-fifth meridian, on the Gulf of Mexico, and running north to the Red river, and thence to the eastern boundary of the Indian Territory; thence along the eastern line of said territory and of the state of Kansas to Kansas City, Mo.; thence, by the Missouri river, to the point of intersection of that river with the eastern boundary line of Montana; thence by said eastern boundary line to the international line between this country and the British possessions. That the said association, by a board created by each company appointing one person to represent it in the association, and that the several railway companies, members of the association, gave to the association the power to establish and maintain rules, regulations, and rates on all competitive traffic, through and local, within the region of

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country described in the agreement; and that said association, by the terms of the agreement, is given the power to punish by fine any member that reduces the rate fixed by the association.

It is further alleged in the bill that the said agreement took effect on the 1st day of April, 1889, and that ever since that time the said railway companies, by reason of said agreement and combination, and under duress of the fines and penalties prescribed in the articles of agreement, have put in force and maintained, and now maintain, tariffs and rates of freight fixed by said association; and that the officers and agents of said railway companies have, ever since said agreement took effect, refused to put in force reasonable rates of freight, based upon the cost of construction and operation of their several lines of railroad and other proper elements to be considered in the making of freight rates; and that the people engaged in trade and commerce within the region of country mentioned in said articles of agreement are, by reason of said combination and association, deprived of rates of freight, benefits, and facilities which might reasonably be expected to flow from free competition between said several lines of transportation. It is further alleged in the bill that, notwithstanding said association is in violation of the act of congress of July 2, 1890, said defendants, since the date of said act, have, and still continue to maintain, the arbitrary rates of freight fixed by the [443] said Trans-Missouri Freight Association, to the great injury and prejudice of the public and to the people of the United States. Then follows the prayer that the defendants, and each of them, be enjoined from further agreeing, combining, conspiring, and acting together to maintain rules and regulations for carrying freight upon their several lines of railroad, to hinder trade and commerce between the states and territories of the United States; and that they be enjoined from continuing in a combination, association, or conspiracy to deprive the people engaged in trade and commerce among the states and territories of the United States of such facilities, rates, and charges of freight and transportation as will be attained by free and unrestrained competition between said several lines of railroad; and that said defendants

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be enjoined from agreeing, combining, conspiring, and acting together to monopolize or attempting to monopolize freight traffic in the states and territories of the United States and that all and each of them be enjoined from agreeing, combining, conspiring, and acting together to prevent each or any of their associates in said agreement from carrying freight and commodities in the trade and commerce between the states and territories of the United States, except at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf.

The defendants the Missouri, Kansas & Texas Railway Company, the Chicago, Kansas & Nebraska Railway Company, and the Denver, Texas & Ft. Worth Railroad Company have filed answers, denying that they were members of the Trans-Missouri Freight Association. The other 15 companies have each filed a separate answer, but, as they are substantially the same as to the facts, it will not be necessary to refer to them separately. They each admit that they are common carriers engaged in transporting persons and property among the several states and territories of the United States, and allege that, as such common carriers, they are subject to the provisions of the act of congress approved February 4, 1887, entitled "An act to regulate commerce," with the various amendments thereof and additions thereto, and that said act and the amendments constitute the system of regulation which has been established by congress for the common carriers subject to said act; and they deny that they are subject to the provisions of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. Further answering, the defendants admit that they severally own, control, and operate separate and distinct lines of railroad fitted up for carrying on business as common carriers of freight, independently and disconnectedly with each other, except that common interest exists between certain of the companies named in the answer. It is further admitted by the defendants that the lines of road mentioned in the bill are lines of transportation and communication engaged in freight traffic between and among the states and territories of the

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United States, and are through lines for freight traffic in that region of country lying west of the Mississippi and Missouri rivers and east of the Pacific ocean, but deny that they are the only such lines, and [444] allege that there are several others, naming them. It is further admitted that prior to the organization of the freight association the defendants furnished to the public, and persons engaged in trade, traffic, and commerce between the several states and territories of the United States and countries named in the bill, separate, distinct, and competitive lines of transportation and communication, and allege that they still continue to do so. It is further admitted that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from the states and territories by loans of credits, donations of depot sites and right of way, and in a few cases by investments of money, and the people of the said states and territories to a limited extent made investments in the stocks and bonds in some of said railroads, while other of the lines mentioned in the bill were almost entirely constructed by capital furnished by nonresidents of said region. It is further admitted that the purpose of said land grants, loans, donations, and investments was to obtain the construction of competitive lines of transportation and communication, to the end that the public, and people engaged in trade and commerce throughout said region of country, might have the facilities afforded by railways in communicating with each other, and with other portions of the United States, and with the world, and denied that they were granted for any other purpose. Defendants further admit the formation, on or about March 15, 1889, of the voluntary association described in the bill as the Trans-Missouri Freight Association.

Further answering, defendants deny that they were not content with rates prevailing at the date of agreement; they deny any intent to unjustly increase rates, and deny that said agreement destroyed, prevented, or illegally limited or influenced competition; they deny that arbitrary rates have been fixed or charged; they deny that rates have been increased, or that the effect of free competition has been counteracted; they deny any purpose in the formation of said association

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to monopolize the freight traffic or commerce between the states and territories within the region mentioned in the bill, and deny that the said agreement is in any respect the unlawful result of any confederation or conspiracy. Further answering, defendants allege that they are subject to the provisions of the act of congress approved February 4, 1887, entitled "An act to regulate commerce," in the matter of adjusting rates on their several roads, so as to prevent unjust discrimination against persons and localities, which involves an adjustment between different companies interested in joint rates, and doing business in said region of country, requiring preconcerted action between defendant companies, and that this service is the greater part of the work of the association. The defendants admit that the chairman of the association is authorized to investigate rate cutting, and that the articles of agreement provide that he may assess fines for violations thereof, but allege that no attempt has been made to enforce the collection of fines since 1890. Further answering, the defendants allege that the principal object of the association is to establish reasonable rates, rules, and regulations on all freight traffic, and the maintenance of [445] such rates until changed in the manner provided by law. It is further alleged that the agreement was filed with the interstate commerce commission, as required by section 6 of the act of February 4, 1887. Defendants further allege that it is not the purpose of the association to prevent members from reducing rates or changing the rules or regulations fixed by the association, and that by the terms of the agreement each member may do so; the preliminary requirement being that the proposed change shall be voted upon at the meeting of the association, after which, if the proposal is not agreed to, the line making the proposal can make such reduced rate notwithstanding the objection of the other lines. That the purpose of this provision is to afford opportunity for the consideration of the reasonableness of any proposed rate, rule, or regulation by all lines interested, and an interchange of views on the effect of such reduction; and that reductions of rates have been made in many instances, through said process, by said association. It is admitted by the answer that this agreement took effect

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April 1, 1889, and that it has since remained operative, and that the rates, rules, and regulations properly fixed and established from time to time, under said agreement, have been put into effect and maintained in conformity to law; but it is denied that by reason of said agreement, or under duress of fines and penalties or otherwise, the defendants have refused to establish and maintain just and reasonable rates, and it is alleged that the object of the association at all times has been and is to establish all rates, rules, and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference.

The answer further denies that shippers or the public are in any way oppressed or injured by reason of the rates fixed by the association, but, on the contrary, it is alleged that the agreement, and the association established under it, have been beneficial to the patrons of the defendant railway lines, composing the association, and the public at large.

A copy of the agreement is set out at length, and attached to the answer of the Atchison, Topeka & Santa Fe Railway Company.¹ The case was set down for hearing on bill and answer, and the pleadings only are to be considered. The answer, therefore, is admitted to be true in all its allegations of fact, even when not stated positively; and the defendants only aver that they believe, and hope to be able to prove, such facts, but the complainant does not thereby admit conclusions of law, nor matters concerning which the court takes judicial notice.

The act of congress of July 2, 1890, which it is alleged in the bill is violated by the agreement to form and the formation of the freight association, in the first section declares every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, to be illegal, and provides for the punishment by fine or imprisonment of every person who shall make any such contract, or engage in any such combination or conspiracy. Section 2 declares that every person who shall monopolize [446] or attempt to monopolize or combine or conspire with any other person or persons to monopolize any

¹ See note at end of case.

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part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine or imprisonment. Section 3 makes the provisions of the first section applicable within the territories, and between one territory and another, and between a territory and a state, and between the District of Columbia and a territory or state. Section 4 confers jurisdiction upon the several circuit courts of the United States to prevent and restrain violations of the act, and makes it the duty of the district attorneys in the respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violation. Section 5 provides for bringing in other necessary parties. Section 6 provides for the seizure and condemnation of property owned under any contract or combination prohibited by the act, and being in the course of transportation from one state to another or to a foreign country. Section 7 gives a right of action to any person injured by violations of the act, and authorizes a recovery of threefold damages. The eighth and last section provides that the word "person" or "persons," whenever used in the act, shall be construed to include corporations or associations existing under or authorized by the laws either of the United States or of the territories or of any state or of any foreign country.

It will be seen from an examination of this statute that its purpose was to reach two evils: First, contracts, combinations, or conspiracies in restraint of trade; and, second, monopolies. It was urged at the argument that the contract mentioned in the bill, and the association formed thereunder, came within the provisions of this act of July 2, 1890, for the reason that it is a contract or agreement in restraint of trade, in that it prevented free competition in the matter of transportation of freight among the several states within the region specified in the bill; counsel for the government insisting that "trade and commerce among the several states of the Union is free, except as regulated and restrained by acts of congress, and that no state, municipality, corporation, individual, or combination of individuals can by any act or device legally restrain, hinder, and retard it." On the other

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hand, it is insisted by the defendants that there is no fixed rule of law by which to determine whether any given contract is in restraint of trade, but that in determining the question the courts must look to the particular circumstances of each case.

In disposing of this branch of the case, I will first briefly refer to some of the decided cases cited by counsel in their briefs.

The case of *Com. v. Carlisle*, Brightly, N. P. 36, was a case where certain master shoemakers had entered into an agreement not to employ any journeymen shoemakers who would not consent to work at reduced wages; the purpose being to re-establish wages for this class of labor which had prevailed before that time, but which the defendants had been compelled to advance by reason of a combination among the workmen. The court, in deciding the case, said:

"Where an act is lawful for an individual it can be the subject of conspiracy when done in concert only where there is a direct intention that in- [447] jury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence flowing from the act."

The case of *People v. Fisher*, 14 Wend. 9, was an indictment against journeyman shoemakers for conspiring together to fix the price of making boots, and establishing a penalty against any journeyman shoemakers who should make boots for a less rate than that fixed by the parties to the agreement, and also agreeing to refuse to work for any master shoemaker who should hire a man who reduced the rates for making boots; and it was held in that case that this was a conspiracy against trade and commerce, and, as such, prohibited under a statute providing: "If one or more persons shall conspire to commit any act injurious to trade or commerce, they shall be guilty of a misdemeanor." In passing upon the case, Savage, C. J., said:

"The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than \$1.00 per pair, but he has no right to say that no other mechanic shall make them for less. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object, are injurious, not only to the individual particularly oppressed, but to the public at large."

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Hooker v. Vandewater, 4 Denio, 349, was an action to compel a division of net earnings between several lines of boats engaged in transporting persons and freight on the Erie and Oswego canals. The agreement was that each party should run his line of boats upon these canals during the period of canal navigation in 1842, at rates of freight fixed by themselves, from which neither should deviate; and to indicate the interest of each the respective lines were converted into stock, amounting in all to 69 shares. All were to share equally in the net earnings of all the lines in proportion to the number of shares of such stock, and to enforce performance of the contract a common agent was appointed, to whom each party to the agreement was to advance and keep good \$35 on each share of such stock, and who was from time to time to receive returns of the business done by each line, and adjust the proportions from the earnings due to each, and out of this common fund to pay and liquidate all such sums as should appear from time to time to be due from one to the other. It was held in this case that the transaction amounted to a conspiracy to commit an act injurious to trade, and was therefore illegal and void.

The case of *Stanton v. Allen*, 5 Denio, 434, was a suit upon a promissory note, given, as stated upon the face of the note, for percentage on tolls for the season of 1843. In this case an agreement had been entered into by the proprietors of boats on the Erie and Oswego canals, to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with a provision in the contract prohibiting the members from engaging in similar business out of the association, and it was held that the tendency of such an agreement was to pre- [448] vent wholesome competition, and was therefore against public policy, and void.

The case of *Association v. Kock*, 14 La. Ann. 168, was a contract between several persons engaged in selling bagging, to the effect that none of them should sell any bagging without the consent of a majority, and providing a penalty of \$10 for each bale of bagging sold in violation of the agreement, and the action was to recover penalties under the agreement,

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amounting to \$7,400. The court in that case decided that the contract was a combination in restraint of trade, for the reason that its purpose was to enhance the market price of an article of prime necessity to cotton planters, and was therefore contrary to public policy, and could not be enforced.

The *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, was an agreement between five coal companies to divide two coal regions of which they had control, and to appoint a committee to take charge of their interests, which committee was to decide all questions, and appoint a general agent at Watkins, N. Y.; the coal mined to be delivered through him. Each corporation was to deliver its proportion, at its own cost, in the different markets, at such time, and to such persons, as the committee might direct, and the committee to adjust the prices and rates of freight. By the terms of the agreement the companies might sell their coal themselves, however, to the extent only of their proportion; the agent to have the power to suspend shipments of either beyond their proportion. Prices were to be averaged, and payments made to those in arrear by those in excess. Neither party to the contract was to sell coal otherwise than specified in the agreement. The action was to recover on a bill of exchange drawn for balances under this contract. It was held that there could be no recovery, for the reason that the contract under which the balances were claimed was void as against public policy.

The case of *Craft v. McConoughy*, 79 Ill. 346, was an action for a division of profits under a contract between grain dealers at the town of Rochelle, in Illinois, in which it was provided:

"Each separate firm shall conduct their own business as heretofore, as though there were no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with; prices and grades to be fixed from time to time as convenient, and each one to abide by them. All grain taken in store shall be charged 1½ cents per bushel monthly. No grain to be shipped by any party at a less rate than 2 cents per bushel."

The court held the agreement void, as in restraint of trade, for the reason that, while the agreement upon its face seemed to indicate that the parties had formed a partnership for

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the purpose of controlling the trade in grain, yet, from the terms of the contract and other proof in the record, it was apparent that the object was to form a secret combination, which would stifle all competition, and enable the parties by secret and fraudulent means to control the price of grain, cost of storage, and expense of shipment; adopting the language of the court:

"In other words, the four firms, by shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of a town and surrounding country."

[449] In the case of *Salt Co. v. Guthrie*, 35 Ohio St. 666, the contract was for the purposes of regulating the prices and grade of salt. By the terms of the agreement each member of the association was prohibited from selling any salt during the continuance of the association, except at retail, and then only to actual consumers at the place of manufacture, and at the prices fixed by the directors from time to time. The action was to recover the possession of 1,000 bushels of salt manufactured under the contract. The court denied the plaintiff's right to recover, stating: "The clear tendency of such an agreement was to establish a monopoly, and to destroy competition in trade," and for that reason, on grounds of public policy, courts will not aid in its enforcement.

The case of *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970, 6 South. Rep. 888, was a suit for specific performance of a contract to divide net earnings between competitive points. The court declined to specifically enforce the contract, saying—

"That all contracts which have a tendency to stifle competition or to create or foster monopolies with the view of unreasonably increasing the market value of commodities are against public interest, and contrary to public policy."

The case of *Anderson v. Jett*, (Ky.) 12 S. W. Rep. 670, was another case of a contract to divide net earnings, and it was there held that, where the object or tendency of the agreement was to prevent or impede free and fair competition in the trade, and where the agreement might in fact have that tendency, it was void, as being against public policy.

The case of *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, was a contract for a settlement between certain gas com-

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panies, which the plaintiff procured, and for his services in procuring the agreement he sought to recover. The object and purpose of the contract was to regulate the price of gas in the city of Baltimore, and provided, among other things, that the rate should not be changed except by mutual agreement of the parties, and that the entire receipts from the sale of gas should be proportioned and divided between the companies in fixed ratios, without regard to the gas actually supplied by either; and also prohibited one of the companies from laying any more pipes for the purpose of supplying the city with gas, and provided that in the future all pipes or mains should become the property of the other company; and also provided that either party violating the terms of the contract should pay to the other company the sum of \$250,000 as liquidated damages. The court in this case, speaking by Chief Justice Fuller, said:

"Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public interest; but where the public welfare is not involved, and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained."

Thus it will be seen that the question whether or not the contract is prejudicial to public interest is in this case made the test. If it is prejudicial to public interest, then it cannot be sustained, even where the restraint is only partial, because in contravention of public policy; where it is not, it may be sustained. It has been decided in a great many cases that contracts in restraint of trade were perfectly valid, even where they prevented the party from engaging in the business, which was the subject-matter of the contract, within the entire state where the contract was made; the test being whether the contract was reasonable, and whether or not it was prejudicial to the public interest.

Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. Rep. 629; *Davis v. Mason*, 5 Term R. 120. In this case Lord Kenyon, in sustaining an agreement restraining a surgeon from practicing his profession within five miles from a certain town, said—

"That the public were not likely to be injured by the agreement, since every other person was at liberty to practice as a surgeon in the town."

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To the same effect is *Homer v. Ashford*, 3 Bing. 322. In the case of *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, the court, in passing upon the validity of a contract in general restraint, which extended throughout the whole kingdom, said:

"All the cases, when they come to be examined, seem to establish this principle: that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable, for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

See, also, *Hubbard v. Miller*, 27 Mich. 15; *Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. Rep. 1005; *Beal v. Chase*, 31 Mich. 490; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419; *Navigation Co. v. Winsor*, 20 Wall. 64.

The case last referred to was a contract in which a party engaged in navigating the waters of California alone sold a steamer to other parties, who were engaged in navigating the Columbia river, in Oregon and Washington territories; and it was agreed between the parties that the purchasers of the steamer should not employ it or suffer it to be employed for 10 years from the date of sale in any waters of California. Three years afterwards, the purchasers, under this contract, sold the steamer to a party engaged in navigating Puget sound, subject to the stipulation that she should not be run or employed on any routes of travel on the rivers, bays, or waters of the state of California or the Columbia river and its tributaries for the period of 10 years. The supreme court held the contract valid. Mr. Justice Bradley, speaking for the court, said:

[451] "It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void, but an agreement which

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operates merely in partial restraint of trade is good, provided it be not unreasonable."

Again, in the same case, the learned justice takes occasion to say that—

"Cases must be adjudged according to their circumstances, and can only be rightly judged when the reason and grounds for the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

I think the cases are uniform to the effect that, where the contract is publicly oppressive, and the restrictions are broader than are necessary for the legitimate protection of the other party to be benefited by the contract, then the contract is unreasonable,—a contract in restraint of trade,—and therefore void; otherwise not. Undoubtedly all contracts which have a direct tendency to prevent healthy competition are detrimental to the public, and, therefore, to be condemned; but when contracts go to the extent only of preventing unhealthy competition, and yet at the same time furnish the public with adequate facilities at fixed and reasonable prices, and are made only for the purpose of averting personal ruin, the contract is lawful. The rule of law which recognizes the rights of the public to have the benefit of fair and healthy competition, and to require that equal facilities and reasonable rates shall be secured to all, does not condemn a contract between railway companies operating competing lines, which is made for the sole purpose of preventing strife, and preventing financial ruin to one or the other, so long as the purpose and effect of such an agreement is not to deprive the public of its right to have adequate facilities and fixed and reasonable prices. On the contrary, such agreements, instead of being obnoxious to the law, because detrimental to the public interest, are to be

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upheld, for the reason that they benefit the public by preventing unjust discrimination among shippers, and providing equal facilities for the interchange of traffic, and thus avoiding many of the unfair and unjust results which often follow the unrestricted competition of rival companies. Applying this rule to the contract complained of in the case at bar, can it be said that the contract is unlawful? I think not. The allegation of fact in the answer (which is to be taken as true) is that the object and purpose of the agreement and the formation of the association thereunder was to maintain just and reasonable rates, and to prevent unjust discriminations, in compliance with the terms of the act regulating commerce, by furnishing equal facilities for the interchange of traffic between the several lines. How, then, can it be said that the [452] public is injuriously affected by this agreement? The rates or charges are uniform and reasonable, and unjust discriminations are prohibited. Equal facilities for the interchange of traffic are provided for; hence no right to which the public is entitled is violated. The term "competition" must not be construed to apply solely to the question of rates. There are many other considerations included within the term. There may be very active competition between these railway lines outside of the question of rates, viz. by offering to the public advantages in the matter of equipment, facilities at feeding stations for the proper care of live stock, shortening of time, and in many other ways the most active competition may prevail, all of which the public receives the benefit of; and so long as the rate charged is fair and reasonable, as stated in the answer, which must be construed to mean no more than a fair compensation to the carrier for the services performed, the public cannot complain.

As stated by Christiancy, J., in the case of *Beal v. Chase*, reported in 31 Mich. 521:

"The public is quite as much interested in the prosperity of its citizens in their various avocations as it can possibly be in their competition. The latter may bring low prices to purchasers, but may also bring them so low that capital becomes unprofitable, and business men fail, to the general injury of the community."

I think that it cannot be said that the public is benefited by competition when that competition is carried beyond the

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bounds of reasonable prosperity to the parties engaged in it, for surely the citizen investing his capital, whether in railways or otherwise, is entitled to the benefit of a contract which affords to him only a fair protection for his investment, and which does not interfere with the rights of the public by imposing unjust and unreasonable charges for the service performed. Such contracts, as was stated in the case of *Homer v. Ashford*, "are not injurious restraints of trade, but securities necessary for those engaged in trade. The effect of such a contract is to encourage, rather than cramp, the employment of capital in trade, and to promote industry." Applying this rule to the agreement under consideration, my own view is that it is not an agreement, combination, or conspiracy in restraint of trade, in violation of the first section of the act of July 2, 1890.

It is further urged by counsel for the government that this association unavoidably tends to a monopolization of trade and commerce, and for that reason is in violation of the second section of the act of July 2, 1890. A "monopoly" is defined by Mr. Justice Story to be "an exclusive right, granted to a few, of something which was before of common right;" and by Lord Coke to be "an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working, or using of everything whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." While it is undoubtedly true that these railroad companies perform quasi public functions, and for that reason owe certain duties to the public, yet, after a careful examination of this contract, I must confess that I have been unable to discover in [453] it a single element of a monopoly, especially as defined at common law. While it is true that the public are entitled to adequate facilities and to just and reasonable rates at the hands of these corporations, they are entitled to just that, and no more; and the allegation of the answer is that this was the very purpose of the contract. In view of this allegation,—which is to be taken as true in this case,—I do not see how it can be said that the contract tends to create a mo-

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nopoly when, by its very terms, everything to which the public is entitled is provided for, and the public interest fully protected. But it is urged by counsel for the government that this should be held to be a contract tending to monopolize trade and commerce, for the reason that its tendency is to prevent free and unrestricted competition. What I have said in reference to competition in discussing contracts in restraint of trade is equally applicable here. My own view is that the contention of counsel is altogether too broad. The public is not entitled to free and unrestricted competition, but what it is entitled to is fair and healthy competition; and I see nothing in this contract which necessarily tends to interfere with that right.

Again, it is urged that this contract amounts to the transfer of the franchises and corporate powers of these railway companies, and that the contract, therefore, is forbidden by public policy. There is no doubt but what it is beyond the power of a corporation to disable itself by contract so that it cannot perform every public duty which it has undertaken. Mr. Justice Miller, in delivering the opinion of the court in the case of *Thomas v. Railway Co.*, 101 U. S. 71, says:

"Where a corporation, like a railroad company, has granted to it, by charter, a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void, as against public policy."

But wherein the principle announced in this case can be applied to the contract under consideration, I am wholly unable to perceive. In what manner are the franchises or corporate powers of any of these railway companies transferred to this association? Each company maintains its organization as before, elects its officers and operates its line in exactly the same manner now as it did before the organization of the association. No powers whatever are given to the association to govern in any respect the operations or methods of transacting the business of any of the lines. Each line is left perfectly free to transact all of the business it can secure, and in its own way. True, the contract re-

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quires that each company shall charge just and reasonable rates, and also contains provision for regulating changes in rates; but wherein is this a surrender of any corporate franchise into the hands of an irresponsible power? The contract provides that this association shall consist of a representative of each of the lines. This representative may or may not be an officer of the company. Suppose we concede that he is not, but is a person appointed by the officers of the company authorized to make such appointment, he [454] then becomes the agent of the company for that purpose, and he may lawfully act on its behalf, and hence his act would be the act of the company through its duly-authorized agent, and the rate, rule, or regulation made by the association and put into effect by any company, party to the agreement, would not be merely the rate, rule, or regulation of the association, but a rate, rule, or regulation of the company itself, acting through its proper officers or agents, and hence no surrender or transfer of any corporate power conferred upon it by its charter; nor would it be thereby relieved of any burden imposed.

One further question remains in this case: Does the provision of the act of July 2, 1890, relate to the business of common carriers, or, in other words, does it include, and was it intended to include, combinations or agreements between railway companies? It is urged by the defendants that they are not included within that act; that the provisions of the act operate, and were intended to operate, upon other and different combinations, and that they have no application to agreements or combinations between railway companies, for the reason that congress had already provided by the act of February 4, 1887, entitled "An act to regulate commerce," a full and comprehensive code of railway regulation, modeled on the most effective systems of the different states and of England. This last-mentioned act may be summarized as follows: That the provisions of the act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water. It provides that all charges for services shall be reasonable and just; that unjust discriminations and undue or unreasonable preferences shall not be

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made; that reasonable, proper, and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding, and delivering of passengers and property between connecting lines shall be provided; that there shall be no discrimination in the rates and charges as between connecting lines; that it shall be unlawful to charge a greater compensation for a short haul than for a long haul over the same line, in the same direction, under substantially similar circumstances; that there shall be no pooling of earnings. The act provides for the filing and publication of tariffs, including joint tariffs of connecting roads, and also provides for 10 days' notice of any advance in rates.

The act further provides that any combination, contract, or agreement, express or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination, shall be unlawful. The act provides penalties for violations of its provisions, establishes a commission of five members to exercise a supervisory control over the common carriers subject to the act, and to enforce the provisions of the act. It will be seen from an examination that this act is in the nature of a special act, being confined in its application to common carriers, while the act of July 2d is clearly, by its terms, a general statute. It includes every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade, and every person who shall monopolize or attempt to monopolize any part of the trade and commerce [455] among the states. I think no rule is better settled than, where a general statute has been enacted, which might include, in the absence of other provisions, a subject-matter which has already received consideration at the hands of the legislature by a special act, that the general act will not be construed to embrace the subject contained in the special act, unless it clearly appears from the language employed that it was the intention of the legislature that it should be included. The intention of the legislature should, of course, be followed, and that is to be ascertained from the words used in the statute, and from the subject to which the statute relates, with a view of meeting the mischief sought to be remedied:

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and in doing this it is the duty of the court to restrict the meaning of general words whenever it is satisfied that the literal meaning would extend the statute to cases which the legislature never designed to include. As stated by Mr. Justice Davis in the case of *Reiche v. Smythe*, 13 Wall. 164:

"If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words whenever it is found necessary to do so in order to carry out the legislative intention."

It is equally the duty of the court to give to these statutes such a construction that both may stand, if that can be done. Applying these rules, can it be said that it was the intention of congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2d? I think it very clearly appears from an examination of these statutes, and considering the evil sought to be remedied, that such was not the intention of congress.

The whole subject relating to common carriers had already been carefully provided for by the act of February 4, 1887, and a commission appointed, whose duty it was to see to it that the carriers subject to that act complied with its requirements, with power to the courts, when necessary, to enforce its provisions; hence it is but reasonable to presume that if congress had considered anything in addition necessary for the proper regulations and control of these carriers, it would have provided for it by an amendment of that act, instead of including it in a general statute, some of the provisions of which would necessarily conflict with the legislation then in force upon a subject which had already received the special consideration of congress. I think it was the purpose of congress to remedy a very different evil then existing. A number of combinations in the form of trusts and conspiracies in restraint of trade had sprung up in the country which were dangerous to its commercial interests; for example, the steel-rail trust, cordage trust, the whisky trust, the Standard oil trust, dressed-beef trust, the school-book trust, the gas trust, and numerous other trusts and combinations, which threatened to destroy the commercial and industrial prosperity of the country. These trusts assumed the absolute control of the various corporations entering into them, direct-

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ing which of the constituent members of the trust should continue operations and which should cease doing business; how much business should be transacted by each, what prices should be [456] charged for their product, and in fact had the power to direct every detail of the business of every corporation forming the trust. It was to combinations and conspiracies of this sort that the act of July 2, 1890, was directed. I conclude, therefore, that the bill should be dismissed, and it is so ordered, but not at the cost of the complainant.

NOTE.

Memorandum of agreement: "Memorandum of agreement made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fe R. R., Chicago, Rock Island & Pacific Ry., Chicago, St. Paul, Minneapolis & Omaha Ry., Burlington & Missouri River R. R. in Nebraska, Denver & Rio Grande R. R., Denver & Rio Grande Western Ry., Fremont, Elkhorn & Missouri Valley R. R., Kansas City, Ft. Scott & Memphis R. R., Kansas City, St. Joseph & Council Bluffs R. R., Missouri Pacific Ry., Sioux City & Pacific R. R., St. Joseph & Grand Island R. R., St. Louis & San Francisco Ry., Union Pacific Ry., Utah Central Ry., and such other companies as may hereafter become parties hereto,—witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article 1. The traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian, thence north to the Red river; thence via that river to the eastern boundary line of the Indian Territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line'; thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico; and thence via said Gulf to the point of beginning, including business between points on the boundary line as described. (2) All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line. Exceptions: (a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah. All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado. The jurisdiction of this association in so far as

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the business of the Denver & Rio Grande Railroad and the Denver & Rio Grande Western Railway Companies is concerned, covers the following traffic, namely: All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad. All freight traffic between Ogden, Spanish Fort, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand. Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway. (b) Traffic included in the Trans-Continental and International Association. (c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers. (d) Traffic passing between Missouri river points and points in the [457] territory east of said river. (e) All traffic to points on the Northern Pacific and Manitoba Railways. (f) Traffic to points in Arkansas. (g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Missouri. (h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado. (i) Business to and from Florence, Colorado, by all lines.

"Art. 2. Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members. Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting—regular or special—is convened it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person, who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents. Sec. 3. A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ, the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree, it shall be arbitrated in the manner provided in article 7. Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic,—eight days in so far as applicable to the traffic of Colorado or Utah. Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due

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notice has been given, and all parties shall be bound by the decision of the association, so expressed, unless then and there the parties shall give the association definite written notice that in 10 days thereafter they shall make such modification, notwithstanding the vote of the association: provided that, if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates, to take effect on the same day. By unanimous consent, any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice. Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association; and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made. Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the [458] association: provided, however, that when one road has a proprietary interest in another, the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms. Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper or any one else to secure a reduction or change in rates or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed. Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed. Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines. Sec. 11. Any member not present

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or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"Art. 3. The duties and powers of the chairman shall be as follows: Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association. Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement; and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require. Sec. 3. He shall construe this agreement, and all resolutions adopted thereunder; his construction to be binding until changed by a majority vote of the association. Sec. 4. He shall publish in joint form all rates, rules, and regulations which are general in their character, and apply throughout the territory of the association, and shall also publish, in the manner above, such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest. Sec. 5. He shall be furnished with copies of all way-bills for freight carried under this agreement, when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof. Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on the members for the different amounts thus shown to be due. Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations, as provided for herein. Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member. Sec. 9. Only the parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3, article 3, of the agreement.

"Art. 4. Any willful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules [459] and regulations of any weighing association or inspection bureau, as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"Art. 5. The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"Art. 6. There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employees, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

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"Art. 7. In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"Art. 8. This agreement shall take effect April 1, 1889, subject thereafter to 30 days' notice of a desire on the part of any line to withdraw from or amend the same."

[40] BLINDELL ET AL v. HAGAN ET AL.^a

(Circuit Court, E. D. Louisiana. February 9, 1893.)

[54 Fed., 40.]

COMBINATIONS IN RESTRAINT OF TRADE—EQUITY JURISDICTION.—The statute against unlawful restraints and monopolies (Act 1890, 26 St. p. 209) does not authorize the bringing of injunction suits or suits in equity by any parties except the government.^b

SAME.—The jurisdiction of the circuit court to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of proof.

SAME—INJUNCTION PENDENTE LITE—EVIDENCE.—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another [41] crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination, pendente lite.

In Equity. Bill by Blindell Bros. against C. Hagan and others to enjoin interference with their business as shipowners. On application for an injunction pendente lite. Granted.

Henry P. Dart and F. B. Earhart, for complainants.

J. Ward Gurley, jr., and J. D. Grace, for respondents.

^a Affirmed by the Circuit Court of Appeals, Fifth Circuit (56 Fed., 696). See p. 182.

^b Syllabus copyrighted, 1893, by West Publishing Co.

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BILLINGS, District Judge.

This application is made and submitted on the bill and amended bill of complaint and numerous affidavits and counter affidavits. The substance of the bill, as amended, is that the complainants are aliens, being subjects of the kingdom of Great Britain, and that the defendants are citizens of the state of Louisiana; that the complainants are owners of the steamship *Violante*, which they are using in the carrying trade between this port and Liverpool; that they are prevented from shipping a crew by the unlawful and well-nigh violent combination of the defendants; that this combination is so numerous as to make it impossible for the complainants to obtain a crew without the restraining order of this court; that this unlawful interference of the defendants is interrupting the business of the complainants, which is that of persons engaged in the carrying trade between New Orleans and Liverpool, and is doing them an irreparable injury. The injunction has been asked for, first, under the act of 1890, (26 St. p. 209,) known as "An act to protect trade and commerce against unlawful restraints and monopolies." This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States are not authorized by it.

This brings me to the second ground upon which the injunction is asked. The citizenship of the parties is such that the United States circuit court has jurisdiction, and the complainants may urge before this court any grievance which they may have in law or equity as fully as they could do in the courts of a state. That the complainants may maintain a suit at law is conceded by the solicitors for the defendants. The prohibition in the statute of 1789 against suits in equity in the courts of the United States, where the plaintiff has a plain and adequate remedy at law, has been repeatedly held to enunciate or introduce no new doctrine, but it is enforced rigidly by the courts of the United States, because, if a suit in equity is allowed, the defendant is cut off from the right

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of trial by jury, which is by the constitution of the United States guaranteed to him in all common-law cases involving upwards of \$20. There can be equity jurisdiction only when the case in question belongs to one of the recognized classes of cases over which equity has jurisdiction. The [42] question, therefore, is, does this case belong to one of those recognized classes? If it does, it is because the nature of the alleged injury is such that it would be difficult to establish in a suit at law the damage of the complainant, and because to entertain it would prevent a multiplicity of suits. Undoubtedly Chancellor Kent lays down the correct rule in *Jerome v. Ross*, 7 Johns. Ch. 333, that cases of ordinary trespass are not within the cognizance of equity; but in *Livingston v. Livingston*, 6 Johns. Ch. 500, 501, he adds a qualification which shows the ground of discrimination between such trespasses as equity will enjoin and those which will not: "There must be something particular in the case of a trespass, * * * or to make out a case of irreparable mischief," in order to authorize equity to interfere, and an injunction to issue.

In Laussats' notes to Fonblanque's Equity, at page 3, he lays down the principle which is the fundamental one, concurred in by all the writers upon equity as the basis of equity jurisdiction in cases of trespass, as follows: "The foundation of this jurisdiction of equity is the probability of irreparable mischief, the inadequacy of a pecuniary compensation, and the prevention of a multiplicity of suits." The difficulty has been in applying this principle. Where there is a large combination of persons to interfere with a party's business by violence, the equity jurisdiction, if maintainable at all, is maintainable on either of two grounds,—the nature of the injury, including the difficulty of establishing in a suit at law the amount of actual damages suffered, or the prevention of a multiplicity of suits. The jurisdiction, for these reasons, was maintained in the following cases: *Emack v. Kane*, 34 Fed. Rep. 47; *Casey v. Typographical Union*, 45 Fed. Rep. 135, 144; *Gilbert v. Mickle*, 4 Sandf. Ch. 381, (marg. p. 357;); *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307. In *Osborn v. Bank*, 6 Wheat, 845, the court says:

"In those cases [wrongful transfer of stocks and other securities] the injured party would have his remedy at law; * * * but it is

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the province of a court of equity in such cases to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete than the law can give."

With reference to another class of cases, courts of equity have sometimes taken jurisdiction for the reason which requires that they should take jurisdiction here, viz. those cases for specific performance when there could be no adequate compensation in damages. In *Taylor v. Neville*, cited by Lord Hardwicke in *Buxton v. Lister*, 3 Atk. 383, a specific performance was decreed of a contract of a sale of 800 tons of iron to be delivered and paid for in a certain number of years, and by installments. Equity enjoins in such cases, because, though the injured party may have his suit at law, his damages must be conjectural. See *Adderley v. Dixon*, 1 Sim. & S. 607, 611. So in cases of trespass, where a business is interrupted, and the profits of pending enterprises and voyages are intercepted, the party injured must fail of recovering full compensation, for his damages must at law be largely conjectural; and for this reason, as well as to prevent a multiplicity of suits, he may, by an injunction in equity, arrest the threatened wrongdoing, and prevent the [43] consequent injury, which is irremediable, because it consists in the loss of profits which are not susceptible of proof.

My conclusion, therefore, is that the bill of complaint in this cause states a case over which a court of equity must take jurisdiction, in that it is a case where the threatened damages are irremediable at law, as well as one where the equity suit will prevent a multiplicity of suits.

As to proof upon the question of fact. There have been filed in this case in all 49 affidavits. I subjoin to this opinion a summary of each of these depositions. The preponderance of proof establishes that the British steamship *Violante* arrived at this port from Vera Cruz November 29, 1892, and on the 30th the crew was paid off. At that time the crew made no complaint regarding the food they received, or their treatment, or the safety of the ship, and continued at their duties until about noon of December 15, 1892, without complaint, except that some of the crew had asked the captain whether they would be paid before leaving port for the days in which the ship had been lying at the wharf, to which he answered

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he could not do so, as it would be a violation of all agreements between the crew and the ship. On December 15, 1892, after the ship had been cleared from the customhouse, and the pilot had come aboard, the crew, with the exception of the steward and the cook, retired from the ship. Being steamer *Violante*, after her crew left, on the 15th of December 15th, as contemplated. It is also established that the steamer *Violante*, after her crew left, on the 15th of December, did not succeed in getting a crew until December 24, 1892, after the restraining orders had been issued against the defendants in this cause, and that, during the whole period of nine days, the police authorities were called upon, and went to the assistance of the master and agents of the vessel in getting a crew; that, while other steamers in the vicinity had no difficulty in getting crews, the steamer *Violante* was unable to get a crew to stay on the vessel until they got the protection of the restraining orders from this court. I think the evidence establishes that the inability of the ship to retain the crew already shipped, and her inability to obtain another crew, except after the interference of this court by its restraining orders, were due to the acts of the defendants. The evidence fails to connect the defendant Dunn with the unfriendly acts of the other defendants. I think the case, upon the question of facts, as well as law, is with the complainants, and that the injunction pendente lite should issue against the defendants, except the defendant Dunn. As to him it is refused.

[994] UNITED STATES *v.* WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS ET AL.*

(Circuit Court, E. D. Louisiana. March 25, 1893.)

[54 Fed., 904.]

INJUNCTION—WHEN GRANTED—UNLAWFUL COMBINATIONS.—Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially

* Affirmed by the Circuit Court of Appeals, Fifth Circuit (57 Fed., 85). See p. 184.

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where the lawfulness of the invasion is not disclaimed, authorizes the injunction.^a

SAME—BILL AND ANSWER—WAIVER OF OATH.—Where the bill for injunction waives the oath of the respondents, an answer, under oath, denying all the equities of the bill, can, under the amendment to equity rule 41, be used at the hearing with probative force of an affidavit alone. Whether the injunction should issue must be determined by the whole evidence submitted.

UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE.—The act declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations," (26 St. at Large, p. 209,) applies to combinations of laborers as well as of capitalists.

SAME—EVIDENCE—ADMISSIBILITY.—In order to sustain the allegations of a bill praying an injunction against a combination in restraint of interstate commerce, the complainant may offer in evidence, as matter of history, the official proclamation of the various government officers, and also newspaper reports supported by affidavits containing manifestoes and declarations of the respondents.

SAME—LAWFUL COMBINATIONS TURNED TO UNLAWFUL PURPOSES.—The fact that a combination of men is in its origin and general purposes innocent and lawful is no ground of defense when the combination is [1895] turned to the unlawful purpose of restraining interstate and foreign commerce.

SAME—LABOR STRIKES.—A combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from state to state, and to and from foreign nations.

In Equity. Suit by the United States against the Workingmen Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. Injunction granted.

F. B. Earhart, United States Attorney.

A. H. Leonard, *M. Marks*, and *Evans & Dunn*, for defendants.

BILLINGS, District Judge.

This cause is submitted upon an application for an injunction on the bill of complaint, answer, and numerous affida-

^a Syllabus copyrighted, 1893, by West Publishing Co.
10870°—S. Doc. 111, 62-1, vol 1—8

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vits and exhibits. The bill of complaint in this case is filed by the United States under the act of congress entitled "An act to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209.) The substance of the bill is that there is a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries. It avers that a disagreement between the warehousemen and their employes and the principal draymen and their subordinates had been adopted by all the organizations named in the bill, until, by this vast combination of men and of organizations, it was threatened that, unless there was an acquiescence in the demands of the subordinate workmen and draymen, all the men in all of the defendant organizations would leave work, and would allow no work in any department of business; that violence was threatened and used in support of this demand; and that this demand included the interstate and foreign commerce which flows through the city of New Orleans. The bill further states that the proceedings on the part of the defendants had taken such a vast and ramified proportion that, in consequence of the threats of the defendants, the whole business of the city of New Orleans was paralyzed, and the transit of goods and merchandise which was being conveyed through it from state to state, and to and from foreign countries, was totally interrupted. The elaborate argument and brief of the solicitors for the defendants presents six objections.

The defendants urge (1) that, the strike or cessation of labor being ended, and labor resumed throughout all branches of business, there is no need for an injunction. I know of no rule which is better settled than that the question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right, either [996] admitted or proved, that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed.

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The question, then, is, what was the state of facts at the time of and prior to the filing of the bill? or whether, if the facts alleged in the bill were true at that time, there was need of an injunction.

The defendants urge (2) that the right of the complainants depends upon an unsettled question of law. The theory of the defense is that this case does not fall within the purview of the statute; that the statute prohibited monopolies and combinations which, using words in a general sense, were of capitalists, and not of laborers. I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the congress came to formulating the prohibition which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

The defendants urge (3) that, the answer being under oath, and denying all the allegations of the bill, the injunction cannot issue. Before the adoption of the amendment to the forty-first rule in equity, it was a rule in chancery practice that, where the answer was under oath, and denied all the equities of the bill, the injunction should be refused; but, since in this case the oath of the respondents is waived in the bill, their answer, under rule 41, can be used at this hearing with the probative force of an affidavit alone, and no longer has necessarily the effect claimed for it by the defendants' solicitors.

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The defendants urge (4) that the proofs in the case are vague, and insufficient to establish the allegations of the bill. When I consider the affidavits of individuals, and the proclamations of the governor of the state of Louisiana and the mayor of the city of New Orleans, and the statements in the public journals, supported by testimony, and the affidavits filed in this cause, I find the material allegations of the bill fully sustained. Not only was the flow of commerce through the city of New Orleans purposely arrested, but even the transportation of the goods and merchandise from the government warehouses to the landings was forcibly stopped. The following exhibits in the case, consisting of proclamations of the governor of Louisiana and the mayor of New Orleans, taken from the official journals, manifestoes, and the recitals of the sayings of [997] the defendants, taken from the public newspapers, which have not been disproved by the respondents, show, as matter of history, the vast proportions of the interruption caused by the defendants to the prosecution of all the branches of business within the city of New Orleans, and the purpose with which it was done, to wit, that no business was to be transacted till the demands made by the employes of the warehousemen and the subordinate draymen were complied with:

"A General Strike Ordered by the Amalgamated Council for To-morrow, Unless the Merchants Recognize the Union this Evening.

"PRESIDENT LEONARD'S STATEMENT.

"When the people of New Orleans awake to-morrow morning, they will probably find that one of the largest strikes that has ever taken place in this city has been inaugurated. To-day, at 12:30 o'clock, President Leonard, of the Amalgamated Council, made his promised statement to the members of the press relative to last night's meeting of the council. Mr. Leonard said that it had been decided at the meeting to order a general strike for to-morrow morning, unless the merchants ask for a conference this afternoon. The unions were determined to compel the employers to recognize them, and they took this step to force this recognition, if possible. Mr. Leonard further said that every trade and line over which the council has jurisdiction will go out, barring none. If at any time during the strike the merchants manifest a desire to recognize the unions, the men will be ordered to return to work, and a conference committee appointed to meet a similar committee from the merchants. The committee of fifteen of the Amalgamated Council will remain in session for some hours this evening, and the employers will thus be given their last chance to accede to the demands of the strikers."

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"THE STRIKE ORDERED.

"HALL AMALGAMATED COUNCIL,
 "New Orleans, November 4, 1892.

"At a meeting of presidents of the labor unions and organizations, held on Friday, November 4, 1892, at the Screwmen's Hall, the following manifesto was adopted and ordered submitted to all the members of labor unions and organizations in the city of New Orleans:

"To All Union Men Wherever Found, Greeting: In view of the fact that in the difficulty existing between the board of trade, merchants, boss draymen, and weighers, and in view of the fact that they claim to represent the entire employing power in the city, and claim broadly and emphatically that they will not recognize unions or labor organizations in connection with their business, and endeavor by their acts to prevent other employers from either employing or recognizing union men, and believing it for the best interests of organized labor that we refrain from working for any employer until the board of trade and others recognize the rights of men to organize into labor unions throughout the city, calling them, as union men, to abstain from any work or assisting in any way in prolonging the existing difficulty. The gauntlet has been thrown down by the employers that the laboring men have no rights that they are bound to respect, and, in our opinion, the loss of this battle will affect each and every union man in the city; and, after trying every honorable means to attain an equitable and just settlement, we find no means left open but to issue this call to all union men to stop work, and assist with their presence and open support from and after Saturday noon, November 5, 1892, and show to the merchants and all others interested that the labor unions are united.

"JAMES LEONARD, *Chairman*.

"JOHN BREEN,

"A. M. KEIR,

"JAMES E. PORTER,

"JOHN M. CALLAGHAN,

"Committee."

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"WILL THE STRIKE BE GENERAL?

"MEETING OF THE AMALGAMATED COUNCIL THIS EVENING.

"To the representative of a morning paper, Assistant State Organizer Porter said the outlook for successful strike was a most excellent, and promised that every union in the city would stand by the locked-out workmen. He said it was possible a general strike would be ordered, and that labor is determined to win this struggle. A union man who was with Mr. Porter is represented to have said that the strike will be made a victory of the laboring classes of the city, and, unless the unions are recognized, there will be more bloodshed than imagined. Mr. Porter is reported to have added: 'We propose to win by peace, if we can; but, if we are pushed to the wall, force will be employed.' There are ninety-seven unions in the city. The Amalgamated Council meets to-night to discuss the strike. The joint conference of the executive committees of the striking organizations met last night, and decided to pay no attention to the invitation of the merchants with respect to the proposed tribunal. Inasmuch as the merchants decline to recognize the unions, the unions refuse to appoint any members of the tribunal, and will only do so when they are given to understand that the men they may appoint are to be regarded as official representatives of their unions."

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"ANSWER TO PROPOSITION OF THE GOVERNOR.

"Nov. 8th, 1892.

"To His Excellency, Gov. M. J. FOSTER.

"DEAR SIR: According to agreement, we were to give you an answer this morning in regard to certain propositions that you have submitted; but, after consideration by the committees, we found that the propositions would have to be first submitted to the executive committee of the merchants' body, and we have not, up to the present time, heard what action was taken in regard to the matter. In consideration of these facts, we now have these propositions to submit, and will have to stand on them: First. We are willing to arbitrate on wages. Second. We are willing to arbitrate on hours. Third. We want the question of 'none but union men to be hired when available, from and after the final adoption of tariff and hours,' to be accepted without arbitration.

"JAMES LEONARD, *Chairman*.

"JOHN BREEN.

"A. M. KEIR.

"JOHN CALLAGHAN.

"JAMES PORTER."

"PROCLAMATION.

"MAYORALTY OF NEW ORLEANS, *City Hall, Nov. 9, 1892.*

"CITIZENS OF NEW ORLEANS: The time has come when I, as your mayor, feel that the forces placed at my command are inadequate to further protect peaceable citizens and their property, owing to the many demands made on them. I am then compelled to call upon all good citizens desirous of the welfare and safety of the city. I, therefore, as your chief magistrate, do hereby issue this, my proclamation, commanding all law-abiding and law-loving citizens to attend at the city hall to-morrow, (Thursday,) Nov. 10, 1892, and then and there to be sworn in as special officers to aid and assist the organized police force of this city in their duties incumbent upon them.

"Given under my hand and seal of office, this ninth day of November, in the year of our Lord 1892.

"By the Mayor,

"JOHN FITZPATRICK.

"CLARK STEEN, *Secretary.*"

"PROCLAMATION OF THE GOVERNOR.

"NEW ORLEANS, LA., *Nov. 10/92.*

"To the People of New Orleans:

"The condition of affairs prevailing in your city during the past ten days; the danger to the peace and good order of this community arising from the paralysis of industry, trade, and commerce, and from the suspension of the usual means of transportation; the insecurity of life and property caused by the perturbed state of the public mind, aggravated by the closing of the gas and electric light works, thus holding out an incentive to criminals to ply their vocation in darkness,—have not escaped my attention, and have caused me the deepest solicitude. I therefore request all peaceable citizens not to congregate in crowds upon the streets and thoroughfares, and I urge upon them to discountenance all undue excitement and acts of violence, and to make known to the officers intrusted with the administration of the law any breaches of the peace. I hereby declare that the people of this city must and shall be protected in the full enjoyment of all their constitutional rights and privileges. All the power

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vested in me by the constitution and laws of this state shall be devoted to the preservation of the peace, the maintenance of good order, and the protection of the lives and property of the citizens.

"MURPHY J. FOSTER, *Governor of Louisiana.*"

"The governor said there were no further orders to communicate at the moment. It is understood, however, that orders are being issued to the militia, and that, after the railroad presidents' meeting is over, an effort will be made to start the street cars. The companies are expected to furnish the drivers, and the entire military force of the state, with the bodies that are being organized as recruits, will be used to furnish them with the necessary protection. That will settle the question very soon whether the rioters or the legally constituted authorities of the state are to be masters of the situation."

The defendants urge (5) that the corporations of the various labor associations made defendants are in their origin and purposes innocent and lawful. I believe this to be true. But associations of men, like individuals, no matter how worthy their general character may be, when charged with unlawful combinations, and when the charge is fully established, cannot escape liability on the ground of their commendable general character. In determining the question of sufficiency of proof of an accusation of unlawful intent, worth in the accused is to be weighed; but when the proof of the charge is sufficient,—overwhelmingly sufficient,—the original purpose of an association has ceased to be available as a ground of defense.

The defendants urge (6) that the combination to secure or compel the employment of none but union men is not in the restraint of commerce. To determine whether the proposition urged as a defense can apply to this case, the case must first be stated as it is made out by the established facts. The case is this: The combination setting out to secure and compel the employment of none but union men in a given business, as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans, from state to state, and to and from foreign countries. When the case is thus stated,—and it must be so stated to embody the facts here proven,—I do not think there can be any question but that the combination of the defendants was in restraint of commerce.

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I have thus endeavored to state and deal with the various grounds of defense urged before me. I shall now, as briefly as possible, state the case as it is established in the voluminous record.

A difference had sprung up between the warehousemen and their employes and the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the [1000] employers in the demands of the employed, it was finally brought about by the employed that all the union men—that is, all the members of the various labor associations—were made by their officers, clothed with authority under the various charters, to discontinue business, and one of these kinds of business was transporting goods which were being conveyed from state to state, and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the streets, and in some instances by violence; so that the result was that, by the intended effects of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved. The question simply is, do these facts establish a case within the statute? It seems to me this question is tantamount to the question, could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But, when lawful forces are put into unlawful channels,—i. e. when lawful associations adopt and further unlawful purposes and do unlawful acts,—the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country. What is meant by “restraint of trade” is well defined by Chief Justice Savage in *People v. Fisher*, 14 Wend. 18. He says:

“The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers

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could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade."

It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well.

For these reasons I think the injunction should issue.

[149] WATERHOUSE ET AL. v. COMER.

(Circuit Court, W. D. Georgia, S. D. April 8, 1893.)

[55 Fed., 149.]

RECEIVERS OF RAILROAD COMPANIES—DIFFICULTIES WITH EMPLOYEES—

ADJUSTMENT BY THE COURT.—Where the property of a railway or other corporation is being administered by a receiver under the superintending power of a court of equity, it is competent for the court to adjust difficulties between the receiver and his employees, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership.

[150] SAME.—It follows, then, that it is in the power of the court, in the interest of public order and for the protection of the property under its control, to direct a suitable arrangement with its employees or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public.

COMMERCE—AGREEMENTS TO RESTRAIN—ACT JULY 2, 1890—COMBINA-

TIONS OF EMPLOYEES.—Rule 12 of an association of locomotive engineers, styled the "Brotherhood of Locomotive Engineers," which provides "that hereafter, when an issue has been sustained by the grand chief, and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said

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road, to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or differences of any nature or kind have been amicably settled,"—is plainly a rule or agreement in restraint of trade or commerce, and violative of section 1 of the act of congress of July 2, 1890.

SAME—CONSPIRACY—REV. ST. § 5440.—Construing several clauses of the interstate commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed.

SAME—RECEIVERS—ADVICE OF COURT.—In this case, the movants having avowed their purpose, in open court, to submit to the construction to be made by the court relating to rule 12 of the brotherhood, the receiver is directed to enter into an appropriate contract with them, subject to the general operation of this decision with reference to said rule.

(Syllabus by the Court.)

In Equity. Petition by Waterhouse and others, styling themselves the "Committee of Adjustment of the Brotherhood of Locomotive Engineers," against H. M. Comer, receiver of the Central Railroad & Banking Company of Georgia, asking that the receiver be directed to make a contract with the locomotive engineers. Granted.

R. W. Patterson, for the motion.

Lawton & Cunningham and *Marion Erwin*, opposed.

SPEER, District Judge.

Cases are frequent where persons intrusted with corporate properties have applied to the courts for the prevention or redress of grievances threatened or inflicted by labor organizations. This is the first instance of which we have any information where members of such an association have by concerted action, in an orderly way, sought the arbitrament of a court to adjust a controversy relative to the wages and conditions of their employment. The recent application to this court of the Order of Railway Telegraphers, with similar

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purpose, was an attempt of this character. It was defeated in limine. The telegraphers, as a body, had abandoned the service of the receiver before they presented their petition. In the mean time, other telegraphers, with equal [151] right to employment by the receiver, had been engaged, and were performing the functions the striking telegraphers had surrendered, and, notwithstanding the solicitude of the court to spare a large number of intelligent young men the distress resulting from their indiscreet action, it was found to be impracticable. The members of the Brotherhood of Locomotive Engineers, who have presented this petition, have a proper standing in court. There are 250 locomotive engineers in the employment of the receiver, upon the various divisions of the Central Railroad & Banking Company of Georgia. Of these 211 are members of the Brotherhood of Locomotive Engineers, and the petitioners are a committee from that membership. They recite in their petition the facts that they have been for several years working under contracts made between a general committee of the brotherhood and the officers of the railroad. Since the 1st day of December, 1891, they have been working under the contract, of which they attach a copy, and since that time the properties have been intrusted to the control of Hugh M. Comer, as the receiver of the court. This contract expired on the 1st day of December, 1892. A few days prior to that time they gave notice to George D. Wadley, general superintendent of the company, that they desired certain changes in the contract. They state further that they have remained in the service of the company, although the superintendent and receiver refused to enter into any new contract or consider the old contract longer in force, unless ordered so to do by the court.

Pending the adjustment of the controversy, which was postponed for 90 days by virtue of a clause in the contract, which entitled the receiver to notice for that period, and of which he claimed the benefit, the court has continued the contract in force.

We have also caused several conferences between the receiver and the engineers, with the hope that an amicable agreement might follow. This expectation has been de-

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feated by a strike on the Savannah, Americus & Montgomery Railroad, the refusal of one of the engineers to haul a train to which a car of that company was attached, his immediate discharge, and the friction between the receiver and the engineers which resulted therefrom. The engineers then applied to the court. They set forth the objects of their order, the advantages of a contract with their employers, and that such contracts are of force upon a very large proportion of the principal railroads of the country. They state that since it has been shown to them that the properties in the hands of the receiver are embarrassed financially, they are content to work in his service without any increase of wages, although they insist that the rate is less than that paid by competing and connecting lines, and they pray that the receiver be directed to continue in force the contract under which they were working at the time the receiver was appointed, subject to such modifications and changes as may be made by the order of the court. They annex a copy of this contract.

The receiver answers: First. That the Grand National Brotherhood of Locomotive Engineers is not incorporated, and that many of its rules and regulations, which have a bearing upon any con- [152] tract its members might make, are withheld from the public. This places him at a disadvantage, and renders uncertain the attitude of the brotherhood in any difficulty which might arise in connection with the contract. Second. That a number of the locomotive engineers employed by him are not members of the brotherhood, and that it is not proper for him to contract in this way with certain employes, while others are employed without such a contract. Third. That such a contract renders it impossible for the officers charged with the operation of the property to have such freedom in its administration as is necessary to its prompt and efficient management. Fourth. As a common carrier, the railroad under his control is liable for damages which may result from the disorganization of its service. That the Brotherhood of Locomotive Engineers is bound by secret obligations to withdraw from the service of railroad companies in a body, causing great damage. Fifth. That he should be at full liberty to select the

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best men and means of managing the business, without regard to organizations of any kind. That his superintendent has prepared a proper schedule of wages and conditions for the employment of engineers and firemen, a copy of which is attached. Sixth. If he should contract with the brotherhood, it would be holding out a premium for his employes to become members of that order, which respondent states is not to the interest of his trust. That the brotherhood renders it impossible for the officers of the railroad to come into direct contact with the employes, and prevents such free intercourse as is necessary to good and efficient service. That no contracts have been entered into with the Order of Railway Conductors and the Brotherhood of Locomotive Firemen, and that he has had no difficulty with the conductors and firemen. He denies that it is usual and customary for railroad companies of the United States to make such contracts with the Brotherhood of Locomotive Engineers.

It will be observed that much of the receiver's answer is an argument against the propriety and policy of contracts of any character between the officers of railway corporations and the representatives of labor organizations. The gravity and importance of the considerations thus presented are exceedingly great. The control, under any circumstances, by the courts, of contracts between representatives of the immense values invested with corporations engaged in the public duty of transportation, and the laborers employed in the same service, will doubtless appear to many as novel and dangerous. It is well, however, to consider if a proper provision, by appeal to the courts, in the frequent and destructive conflicts between organized capital and organized labor will not afford the simplest, most satisfactory and effective method for the settlement of such controversies. Is it not the only method by which the public, and, indeed, the parties themselves, can be protected from the inevitable hardship and loss which all must endure from the frequently recurring strikes?

It will not be wise for those engaged with the maintenance of public order to ignore the immensity of the changes in the relations of the employing and the employed classes,

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occasioned by the phenomenal development of commerce and the prevalence of labor organizations. We are in this case directly concerned with a corporation and a labor organization, and both engaged in railway transportation; and in this department of industry it is reported by the interstate commerce commission that there is invested, in the United States \$9,829,475,015, or nearly eight times the entire national debt of the country. Last year the railroads transported 530,000,000 passengers, or more than eight times the entire population of the United States. The operatives employed by them number 784,000, and it is no trifling testimony to the faithfulness and efficiency of this mighty army of railroad employes that of the vast population transported under their care only 293, or less than one twenty-thousandth of 1 per cent. lost their lives. It is, moreover, true that no operatives of a railroad more than locomotive engineers are charged with the preservation of life and property, and when we are advised by the proof that 32,000 of the locomotive engineers of the United States, more than 80 per cent., belong to the brotherhood, it is difficult to believe that their membership lessens efficiency to employers or fidelity to their supreme duty to the public. But whether these facts and other facts equally significant will justify judicial control of contracts essential to the uninterrupted transportation of the country, in which the public is so vitally concerned, it is clear that where the property of railway or other corporations is being administered by a receiver, under the superintending power of a court of equity, it is competent for a court to adjust difficulties between the receiver and his employes, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. Indeed, the power of the court to direct a contract between its officers does not appear to be questioned. The power of the court has always, on proper occasions, been exercised to protect the properties from the damaging and unlawful results of a strike of the laborers in its employ.

In the case of *The Telegraphers v. Comer*,¹ (decided at

¹ Not reported, as the present case is controlling on the questions in issue.

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this term,) while this court, as above stated, was prevented by their own conduct from according to the petitioners the practical relief they sought, they were enjoined from any interference with the property, operations, or employes of the receiver, and rules were issued against individuals who were charged with such interference. *In Re Higgins*, 27 Fed. Rep. 444, the learned circuit judge of this circuit, the Honorable Don A. Pardee, declared:

"It is well-settled law that whoever willfully interferes with property in the possession of a court is guilty of a contempt of that court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the court, in the full and complete possession and management of the property in the custody of the court, is guilty of a contempt of court, and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation and threats. The employes of the receiver, although pro hac vice officers of the court, may quit their employment, as can employes of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently. Where they combine and conspire to quit, with or without notice, with the [154] object and intent of crippling the property or its operation, I have no doubt that they thereby commit a contempt; and all those who combine and conspire with employes to thus quit, or, as officials of labor organizations, issue printed orders to quit, or to strike, with an intent to embarrass the court in administering the property, render themselves liable for contempt of court."

Certainly, it follows, then, that it is in the power of the court, in the interest of public order, and for the protection of the property under its control, to direct a suitable arrangement with its employes or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public. There is no reason why the receivership, in this respect, should be conducted in a manner differing from the large preponderance of the successful and prosperous railroads of the country. It appears from the proof that about 90 per cent. of the railroads of the United States make contracts or schedules of rates and regulations for the employment of their operatives, which are agreed to by the representatives of both parties. We are satisfied from these facts that such arrangements, under proper restrictions, are praiseworthy and beneficial to both parties, and we therefore shall not longer hesitate to direct the receiver to enter into an appropriate contract or schedule of rates and regulations with the engineers. This

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contract, however, will not be restricted to members of the Brotherhood of Locomotive Engineers, although membership of that order is and will be no disqualification to service on railroads under the control of this court so long as the rules and regulations of the order are treated as subordinate to the law of the land. The contract will comprehend all engineers employed by the receiver, whether members or non-members of the brotherhood.

This brings us to the consideration—First, what is an appropriate contract; and, second, whether there is anything in the rules and regulations of the brotherhood and its relations to these properties which is inconsistent with the law, and which would make it improper for the court to place its receiver in a position where, in his exigent duty to carry on the business of transportation, for which the railroad was chartered by the state, he may find himself in the power of an organized body of his operatives who will be able to paralyze the operations of the properties. The appropriateness of the contract depends solely upon the arrangement of details. There is no difference between the engineers and the receiver upon the question of compensation. There is an apparent dispute about the effect of seniority of service of an engineer as affecting promotion. The court will provide, however, that, where merit and ability are equal, seniority of service shall prevail, and will arrange a fair tribunal for the purpose of testing the merit and ability of various candidates for promotion, with the privilege of either party in cases not reconcilable to appeal to the court. There are other instances of minor disagreement which the court will take time to adjust and to perfect the agreement.

We have noted with gratification the repeated statements made in *judicio* by the engineers and their counsel that they will accept [155] as final and satisfactory of every difference the conclusion and decision of the court. The receiver has also expressed more than once his purpose to abide the decision. This submission, so unlike the violent and irrational course pursued by either party, as their interests might prompt, and without the slightest regard to the rights of the public, in many conflicts between what are popularly called "capital and labor," is considerate, judicious, and strongly

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argues that the engineers who are before the court are good citizens,—indeed, patriots who respect and confide in the constituted authorities of their country. Fortunate will it be for our country if future differences of a similar character may be settled by a method so simple and so safe. This submission of the engineers applies as well to the remaining and most important difference between the parties, and that is the effect upon the duty to the court and to the property of the rule of the brotherhood, which is understood by the court to be as follows:

“(12) That hereafter when an issue has been sustained by the grand chief and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of the obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues of difference of any nature or kind have been amicably settled.”

This rule is understood to have been adopted by the brotherhood in Denver three years ago. In his testimony, Mr. A. B. Youngson, the assistant chief engineer, frankly admitted that the effect of this rule, as applied to the properties in the hands of the receiver and the engineers in his employ, would be as follows: If, in the pursuance of the business of a common carrier, with which the receiver is charged, it should become necessary to convey over the lines of the Central Railroad a car belonging to a railroad company on which there was a strike of the engineers, that it would be the duty of the brotherhood men in the employ of the receiver to refuse to haul the train containing such car, and, if the officers of the road insisted that the car should proceed, loyalty to the brotherhood required that the engineer should at once resign his station, and abandon his duty. He might, he stated, if he thought proper, carry the train to the terminal point.

An illustration of the effect of this rule is afforded by the evidence. A strike was recently pending on the Savannah, Americus & Montgomery Railroad, which runs in connection with and is adjacent to the Central. Engineer Arden of the Brotherhood of Locomotive Engineers, in the employ of the

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receiver, was directed to carry a car of the Savannah, Americus & Montgomery road between two stations on the Central Railroad. He declined to do so, and was at once discharged. A committee of the brotherhood have insisted on his reinstatement. This the receiver has refused, and it is certain that but for the pendency of the proceedings now under consideration by the court, there would be, as a result of Engineer Arden's construction of his duty, and the receiver's action, a strike of the [156] engineers upon every line of the Central, with all the calamitous results to the public, to the road, and to the engineers which would inevitably ensue. The receiver relies upon this as the main and controlling reason why he should not be required to enter into a contract with the brotherhood, when this rule 12 will necessarily be written into the contract. Now, there can be not a doubt that this rule of the brotherhood is in direct and positive violation of the laws of the land, and no court, state or federal, could hesitate for a moment so to declare it.

It is plainly a rule or agreement in restraint of trade or commerce. Section 1 of the act of July 2, 1890, known as the "Sherman Anti-Trust Law," provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court."

Section 7 of the act of February 4, 1887, entitled "An act to regulate commerce," provides—

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated as, one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act."

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Section 8 of the same provides—

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as a part of the costs in the case."

This is the interstate commerce law, and, as amended by the act of congress of March 2, 1889, provides:

"Sec. 3 (a) Undue Preference. That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (b) Facilities for Interchange of Traffic. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, [157] and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

"Sec. 10. Penalties for Violation of the Act. That any common carrier, subject to the provisions of the act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or who shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by this act to be done, not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed \$5,000 for each offense: provided that, if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

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The laws of the United States (section 5440 of the Revised Statutes) provide:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not more than two years."

Construing these several enactments together, it will be seen that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade and commerce of the country, will be obnoxious to severe penalties. This will apply with even greater force to persons in the employ of the railroads concerned.

Now, it is true that in any conceivable strike upon the transportation lines of this country, whether main lines or branch roads, there will be interference with and restraint of interstate or foreign commerce. This will be true also of strikes upon telegraph lines, for the exchange of telegraphic messages between people of different states in interstate commerce. In the presence of these statutes, which we have recited, and in view of the intimate interchange of commodities between people of several states of the Union, it will be practically impossible hereafter for a body of men to combine to hinder and delay the work of the transportation company without becoming amenable to the provisions of these statutes. And a combination or agreement of railroad officials or other representative of capital, with the same effect, will be equally under the ban of the penal statutes. It follows, therefore, that a strike, or "boycott," as it is popularly called, if it was ever effective, can be so [158] no longer. Organized labor, when injustice has been done or threatened to its membership, will find its useful and valuable mission in presenting to the courts of the country a strong and resolute protest and a petition for redress against unlawful trusts and combinations which would do unlawful wrong to it. Its membership need not

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doubt that their counsel will be heard, nor that speedy and exact justice will be administered wherever the courts have jurisdiction. It will follow, therefore, that in all such controversies it will be competent, as we have done in this case, for the courts to preserve the rights of the operatives, to spare them hardship, and at the same time to spare to the public the unmerited hardship which it has suffered from such conflicts in the past. It will be also found that by such methods organized labor will be spared much of the antagonism it now encounters, and in its appeal to the courts it will have the sympathy of thousands, where, in its strikes, it has their opposition and resentment.

But, if there were no statutory enactments upon the subject, no court of equity could justifiably direct its receiver to enter into a contract with a body of men who hold themselves bound to repudiate their contract, and disregard a grave public duty, because of real or alleged grievances, which some other person or corporation, not a party to the contract, inflicts or is alleged to inflict, not upon a party to the contract, but upon somebody else. To compel the receiver to do this would be monstrous. The receiver may be wholly just, considerate, humane, and even indulgent, to the engineers in his employ. They may, with reason, regard him not only as their kindly employer, but as their friend. The people of Georgia may have afforded to them every needed evidence of sympathy; the compensation may be ample; their future as bright as possible for intelligent, energetic, and courageous manhood; and yet, because of a difficulty with or without cause which originates in Maine or Minnesota, they will abandon the service of their kind employer, and forego the realization of their own hopeful anticipations, and bring dismay, and it may be ruin, upon the kindly and sympathetic people among whom they live. This is almost the inevitable consequence of this rule. It is in evidence, and is generally known, that almost the entire business of transportation of freight is carried on in cars which, without breaking the bulk of their freight, are forwarded from one railroad to another. This is an absolute necessity. The interests of the public and the economies of cheap and rapid transit demand it. There are 1,200,000

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cars upon the railroads of the United States. There are 168,400 miles of railroad, or more than seven cars per mile.

The Central Railroad, according to the recent report of the superintendent, has less than two cars per mile. It is therefore indispensable that it should use the cars of other lines; but, if it were otherwise, it would be impossible, under the present system, to deny to the cars and freight of other lines transit over the lines of the Central without violation of the law. The receiver cannot violate the law, and the engineers cannot compel him to do so without themselves becoming obnoxious to the criminal statutes. And the court [159] does not doubt, from their bearing and testimony in the case, that they only need to be advised of these facts, when they will immediately recede from the unlawful and most dangerous attitude in which this rule has placed them. It is, indeed, a rule which, more than all others, has given strength and comfort to the enemies of organized labor.

It is true, however, that the learned counsel for the petitioners, when his attention had been called by the court to the insuperable difficulty in the way of a mutually beneficial contract presented by this rule, while insisting that it ought not to stand in the way of a contract, hastened to afford additional evidence of the good faith of his clients, by stating unreservedly that upon this, as upon all subjects, they were willing and anxious to take the direction of the court. This declaration is authoritative, and the court will act upon it. It is binding upon the engineers of the brotherhood, who are officers of the receiver, and who were represented by the committee and their assistant chief engineer, Mr. Youngson, all of whom were in the presence of the court when it was made. It is accepted as made in good faith, and as a condition of the contract which the court will direct the receiver to make. While, therefore, any engineer may, at any time, exercise his right as an individual to leave the services of the receiver, he may not do so in such manner as to injure the properties or impede its proper management.

In case of any issue with the management in which the brotherhood or its members are concerned, and the members in the employ of the receiver shall desire to leave his services, in a body or otherwise, in such manner as may in any way

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impede the operations of the road, they will be required to do so upon such terms and conditions as to the court may seem proper for the protection of the interest of the property and the maintenance of justice and fair play to all concerned. In the mean time the old contract will remain in force, always under the general operation of this decision with reference to rule 12 of the brotherhood, until the terms of the new contract are definitely settled by the court; and it will be specially directed that no engineer or other person in the employ of the Central Railroad shall be discharged or in any way injured in his station on account of this proceeding, or any step taken in regard to its inception or advocacy.

[605] UNITED STATES v. PATTERSON ET AL.*

(Circuit Court, D. Massachusetts. February 28, 1898.)

[55 Fed., 605.]

MONOPOLIES—INDICTMENT—CONSPIRACY—ACT JULY 2, 1890.—St. U. S. 1890, c. 647, declares illegal contracts, combinations, or conspiracies in restraint of trade, and makes it a misdemeanor for any person to make or engage in them, or to monopolize, or attempt or conspire with others to monopolize, any part of the trade or commerce among the several states or with foreign nations. *Held*, that in an indictment under this chapter it is not sufficient to declare in the words of the statute, but the means whereby it is sought to monopolize the market must be set out, so as to enable the court to see that they are illegal.^b

SAME.—Allegations of what was done in pursuance of an alleged conspiracy are irrelevant in an indictment under this statute, and are of no avail either to enlarge or to take the place of the necessary allegations as to the elements of the offense.

SAME—SCOPE OF THE STATUTE.—The words "trade and commerce," as used in the act, are synonymous. The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression, "contract in restraint of trade," as they are analogous to the word "monopolize," used in the second section of the act. This word is the basis and limitation of the statute, and hence an indictment must show a conspiracy in restraint by engrossing or monopolizing or grasping the market.

* Rehearing on general demurrer granted and demurrer overruled (50 Fed., 280). See p. 244.

^b Syllabus, statement of the case, and abstracts of arguments copyrighted, 1893, by West Publishing Co.

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It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.*

SAME—ACTS OF VIOLENCE.—Where counts in such indictment allege a purpose of engrossing or monopolizing the entire trade in question, acts of violence and intimidation may be alleged as the means to accomplish the general purpose.

At Law. Indictment in 18 counts against John H. Patterson and others for violating the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," (26 St. p. 209, c. 647.) Heard on demurrer to the indictment. Judgment overruling the demurrer as to counts 4, 9, 14, and 18, and sustaining it as to the others.

The sections of the statute immediately in question here are the following:

[606] "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first ten counts of the indictment are for engaging in a conspiracy in restraint of trade and commerce among the several states in violation of the first section of the act. The last eight counts are for a conspiracy to monopolize a part of the trade and commerce among the several states, in violation of the second section of the act.

The first half of each set of counts allege the conspiracy, setting forth the means with various degrees of particularity,

* See, however, the case of *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994, decided in the circuit court for the eastern district of Louisiana by Judge Billings, March 25, 1893, in which it was held that the statute included combinations of workmen, who, by means of a strike, combined with threats, intimidations, and violence, caused a cessation of business, which resulted in delaying, interrupting, and restraining interstate and foreign commerce.

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but without alleging overt acts. The second half of each set repeat the allegations of the first half, adding also allegations of overt acts.

In all the counts the conspiracy charged is described as being a conspiracy, (in the first set of counts in restraint of trade, and in the second set of counts to monopolize trade,) not by means of any contract or combination operating upon the parties to the conspiracy themselves, but by means of destroying or preventing the trade of others; so that the trade to be restrained was other people's trade, and the monopoly sought was to be secured by driving other people out of business.

The first count of each set charges that the object of conspiracy was to accomplish this end by fraud and misrepresentation, deceit, threats, intimidation, obstruction, and molestation, and other unlawful, oppressive, and vexatious means; the second charges that it was to be attained by preventing other persons from carrying on business; the third, that it was to be attained by preventing others from engaging in business by means of threats, intimidation, etc.; the fourth, that it was to be attained by preventing others from carrying on business by means of harassing and intimidating competitors, by threatening them, by causing them and their agents to be assaulted and injured, by inducing their agents and employes to leave their employment, by employing spies to obtain knowledge of their business secrets, by harassing and intimidating purchasers, by inducing purchasers to break their contracts and refuse to pay sums owing to competitors, by agreeing to maintain and maintaining persons so refusing to pay in the defense of suits against them, by delaying and impeding the progress of suits, by threatening prospective purchasers with annoyance, molestation, and injury in the event of their purchasing from competitors, by causing persons to call upon such purchasers repeatedly and unnecessarily to occupy their time, and dissuading and persuading them from buying from competitors, by causing great numbers of vexatious and oppressive actions for the infringement of patents to be brought against such [607] purchasers, by threatening intending purchasers from competitors with suits for infringement of patents, and

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thereby, and by other similar means, making it impossible for competitors to continue business; the fifth count of the first set gives the names of certain competitors who are engaged in interstate trade, and sets forth with still greater particularity the means by which it was the object of the conspiracy to destroy the business of those competitors.

Frank D. Allen, United States attorney.

FIRST.

MEANING OF THE ACT.

In *Heydon's Case*, 3 Coke, 7, the barons of the exchequer lay down the following rules: "For the sure and true interpretation of statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: (1) What was the common law before the making of the act? (2) What was the mischief and effect against which the common law did not provide? (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy."

These questions will be discussed in their order as relating to the statute now under consideration.

(A) STATE OF THE LAW BEFORE THE PASSING OF THE ACT.

Two questions naturally present themselves here: (1) What was the common law in regard to the subject-matter of the statute? and (2) what was the relation of the United States government and of the United States courts to that law?

The terms in the statute which naturally call for comment in this case, are the following: (a) "Contract," (b) "combination," (c) "conspiracy," (d) "restraint of trade or commerce," (e) "trade or commerce among the several states or with foreign nations," (f) "monopolize."

(a) "Contract." The meaning of this word is elementary, and it is not necessary to discuss it, except in connection with the following words, "in restraint of trade."

(b) "Combination." This word is used in the statute in a broader sense than the words "contract" on the one hand and "conspiracy" on the other. It has no technical, legal signification; and the words, "combination in the form of trust or otherwise," are intended to cover broadly any sort of a union of different persons, even though such union may not be sufficient to answer to the technical term "conspiracy," and may not include a binding contract. As modified by the subsequent words, "in restraint of trade," it refers to that class of cases where there is no binding contract, and perhaps includes certain cases in which there are no legal means contemplated so as to make it a conspiracy, and no sufficient union or agreement to make either a monopoly or a contract.

(c) "Conspiracy." This is a word of well-known legal signification. It is sometimes used to indicate simply the coming together and agreeing of persons, but in a penal statute is clearly to be construed as including the idea of illegality, created either by the illegal character of the ultimate object sought to be attained, or by the illegal

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character of the means by which it is contemplated that the desired result shall be accomplished, or both of these together. It is well settled at common law, and has been from early times, that conspiracies to accomplish a thing illegal in itself, and also conspiracies to accomplish a thing lawful in itself by unlawful means, are criminal. In *U. S. v. Lancaster*, 44 Fed. Rep. 896, the court say: "A conspiracy is an unlawful confederacy or combination of two or more persons to do an unlawful act, or have accomplished an unlawful purpose." *Com. v. Hunt*, 4 Metc. (Mass.) 123; *Rea v. Gray*, 3 Harg. St. Tr. 519; *Spies v. [608] People*, 122 Ill. 212, 218, 12 N. E. Rep. 865, 17 N. E. Rep. 898; 3 Greenl. Ev. § 189; Washb. Crim. Law, (2d Ed.) 42, etc. It is unnecessary to enter with nicety into the question of just what ends or means are sufficiently unlawful to render a conspiracy criminal, since it is quite clear that a conspiracy which includes in the means for its accomplishment threats and intimidation, the committing of assaults, the maintenance of actions, and the inducing of parties under contract to break their contracts, is criminal in character. Nor is it necessary to endeavor to discriminate carefully between conspiracies which are civilly actionable and those which are criminal, since it is obvious that a criminal conspiracy is also civilly actionable if anything is done under it resulting in injury to the party complaining.

(d) "Restraint of trade or commerce." These words modify each of the words "contract," "combination," and "conspiracy." Taken in connection with the word "contract," they point to a well-known legal conception, viz. "contract in restraint of trade." A contract, the total effect of which is to restrain trade, is void; but if the restraint upon the trade of one party to the contract be no greater than is necessary to protect some interest of the other acquired by the contract, it is evident that the contract encourages the trade of one party as much as it restrains that of the other, and hence the public is not injured and the contract is valid. Upon this general principle it may be laid down that—

(1) An agreement for the restraint of the trade of one of the parties thereto is valid if limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case.

(2) An agreement for the restraint of the trade of one of the parties thereto is invalid unless so limited.

Gibbs v. Gas Co., 180 U. S. 396, 9 Sup. Ct. Rep. 553; *Navigation Co. v. Winsor*, 20 Wall. 64. See, also, *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Craft v. McConoughy*, 79 Ill. 346; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1, and note; *Hilton v. Eckersley*, 6 Bl. & Bl. 47, 66; *Roustillon v. Roustillon*, 14 Ch. Div. 351; *Coltins v. Locke*, L. R. 4 App. Cas. 674; *Mallan v. May*, 11 Mees. & W. 653; *Palmer v. Stebbins*, 3 Pick. 188, 193.

It will be obvious that in the case put the trade is restrained by the provisions of the contract itself, and is necessarily the trade of one or more of the parties to the contract. A contract between A. and B. cannot, in and of itself, restrain the trade of C. A. and B. may agree to restrain the trade of C., but such an agreement is a contract to restrain, not a contract in restraint of trade. As to such a contract three propositions may be laid down:

(1) If the parties to the contract have no business of their own similar to that to be restrained which the contract is intended to promote, the contract is illegal, and a conspiracy, not only because it restrains trade without the justification of promoting any other trade, but also because from the nature of the case it is an agreement to do another an injury maliciously and without cause.

(2) If A. and B. enter into an agreement for the principal purpose

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of promoting and extending their own business by none but lawful means, and without any intention to create a monopoly, such agreement is valid, although it have for its natural and expected result the injury and destruction of the business of C.

Such a contract, even when carried out, does not, on the whole, and viewed in its entirety, restrain trade at all, since it only operates to restrain C's trade in so far as it operates to promote the trade of A. and B.

(3) If A. and B. enter into an agreement for the purpose of promoting and extending their own business by restraining and destroying the business of C. by the use of unlawful means, such agreement is illegal, and a conspiracy, whether said unlawful means be of a criminal nature or not.

Such a contract is illegal and a conspiracy, both because of the illegal means contemplated, and because it does, when viewed in its entirety, contemplate a restraint of trade. The restraint of C's trade in this case is not simply the [609] result of the promotion of the trade of A. and B., and coextensive with it, but the extent of the restraint is wholly independent of the extent of the promotion, and may be absolute and entire, without any promotion at all. This must be true whenever the means are other than such as are intended and calculated to increase the trade of the contracting parties. Hence it was properly decided in *Mogul Steamship Co. v. Macgregor, Gow & Co.*, 15 Q. B. Div. 476, 23 Q. B. Div. 598, [1892,] App. Cas. 25, that an agreement to drive a competitor out of business by lowering prices is not illegal. In this case shipping companies formed an agreement by which they endeavored to get the business of a certain port in China by placing their rates so low that another company could not compete with them, and was obliged to give up the business. The house of lords held that this was not an unlawful restraint of trade; that a trader could not be prevented from charging what he pleased, although he did it with a view of getting the trade himself, and of driving a competitor out of the business; but it was also laid down as unquestioned law that any such restraint effected by unlawful means would make the restraint illegal, and that a conspiracy to enforce restraint by such means would be criminal. In the queen's bench division, *Bowen, L. J.*, (23 Q. B. Div. 614,) after stating that a merchant may lawfully compete with another by lowering his own prices to any extent, even with the intention of driving the other out of business, and then raising his own prices, says:

"No man, whether trader or not, can, however, justly damage another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by a show of violence, the obstruction of actors on the stage by preconcerted hissing, the disturbance of wild fowls in decoys by the firing of guns, the impeding or threatening servants or workmen, the inducing persons under personal contracts to break their contracts,—all are instances of forbidden acts."

On page 616 he defines an "illegal combination" as "an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means," and cites two criminal cases in support of the proposition. On page 618, after stating that in cases where there is no intimidation, molestation, or other forms of illegality, acts may be done intentionally which will injure others in their business, provided they are done bona fide "in the use of a man's own property, in the exercise of a man's own trade," he continues: "But such legal justification would not exist when the act was merely done with the intention of causing

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temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights."

Particular attention is called to the cases cited by Bowen, L. J., in support of that part of his opinion which has been quoted. These cases are all quoted again in the house of lords, and amply sustain the statements that have been quoted. These cases are: *Tarleton v. McGawley*, Peake, 270, (driving away customers by show of violence;) *Clifford v. Brandon*, 2 Camp. 358, and *Gregory v. Brunswick*, 6 Man. & G. 205, (preconcerted hissing of actors;) *Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, Id. 574, note, (disturbance of wild fowl in decoys;) *Garret v. Taylor*, Cro. Jac. 567, (threatening to vex prospective purchasers with suits;) *Bowen v. Hall*, 6 Q. B. Div. 333, and *Lumley v. Gye*, 2 El. & Bl. 216, (injuring persons by inducing others to break contracts with them.)

It is fully recognized in the foregoing cases that a contract which contemplates the doing of any unlawful acts, either as a means or an end to the injury of another, is a criminal conspiracy. It is elementary law, however, that a conspiracy need not involve any binding contract. The mere agreement in a common purpose is sufficient. It is obvious, moreover, that the very fundamental idea of "conspiracy" involves the agreement in a common purpose to injure some one or something outside of the conspirators themselves. The conspiracy may contemplate the acquisition of a benefit by the conspirators, but this is not what makes it unlawful, but the fact that it also necessarily contemplates injury to another. A contract, or even a combination, may refer exclusively to the property or persons of the contracting or [610] combining parties, but a conspiracy necessarily involves contemplated action against the persons or property of some outside person.

It follows that, if the meaning of the words, "conspiracy in restraint of trade," is to be determined by the common-law meaning of the words separately considered, it means a conspiracy to restrain the trade of some person other than the conspirators. Such a conspiracy is illegal, and, under this statute, criminal, if it intends a restraint of such trade by any means which do not in the nature of the case tend to promote the trade of the conspirators in a degree equal to the restraint, especially if such means are in and of themselves unlawful. The existence of unlawful means is conclusive, both as to conspiracy and as to the restraint of trade being unjustifiable. Clearly, a conspiracy to restrain trade by threats, intimidation, molestation, violence, and the other means alleged in this indictment, falls within this definition.

The whole history of the law of conspiracies in restraint of trade confirms this conclusion. 3 Steph. Hist. Crim. Law, pp. 202-227, upon "Conspiracies in Restraint of Trade;" Wright, Crim. Cons. 144-181; Ray, Contract. Lim. 334-411. An examination of the statutes that have been passed upon the subject of conspiracies in restraint of trade shows that they are aimed at any and all restraint, whether by employes or employers, which is endeavored to be enforced by threats, intimidation, or other unlawful means. Thus 38 & 39 Vict. c. 86, § 7, makes it an offense to use violence or to intimidate to compel another to do or abstain from doing any act which he has a legal right to abstain from or to do. So in New York it is made a misdemeanor "to prevent another from exercising a lawful trade or calling, or doing any other lawful act by force of threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; and also to permit any act injurious to the public health, to the public morals, or to trade or commerce, or for the perversion or obstruction of justice or of the due administration of the law." See, also, the statutes of other states, collected in Ray, Contract. Lim., supra."

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It is true that most of the cases in the books are cases of intimidation on the part of workmen against their employers or against other workmen, or of employers against their workmen. But the language of the statutes and the principles of decision apply with equal force to conspiracies by any persons against the trade of other persons.

(e) "Trade or commerce among the several states or with foreign nations." This subject will be discussed later.

(f) "Monopolize." "Monopolies are much the same offenses in other branches of trade that ingrossing is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. They are said to differ only in this: that monopoly is by patent from the king, ingrossing by the act of the subject, between party and party, and have been considered as both equally injurious to trade and the freedom of the subject, and therefore equally restrained by the common law. By the common law, therefore, those who are guilty of this offense are subject to fine and imprisonment, the offense being *malum in se*, and contrary to the ancient and fundamental law of the kingdom; and it is said that there are precedents of prosecutions of this kind in former days. And all grants of this kind, relating to any known trade, are void by the common law." 1 Russ. Crimes, 350.

"It is said that all grants of this kind, relating to any known trade, are made void by the common law, as being against the freedom of trade, and discouraging labor and industry, and restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniences to the public." Hawk. P. C. c. 79, p. 203. *East India Co. v. Sandys*, Skin. 224.

"Hence, also, it seems that the king's charter empowering particular persons to trade to and from such a place is void, so far as it gives such persons an exclusive right of trading and debarring all others; and it [611] seems now agreed that nothing can exclude a subject from trade but an act of parliament." Hawk. P. C. 293, note 2.

In the *Case of Monopolies*, 11 Coke, 84, it was held that a grant by the crown of the sole making of cards within the realm is void; and it is said that "there are three inseparable incidents to every monopoly against the commonwealth, i. e.:

(1) "That the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleasee.

(2) "That after the monopoly granted the commodity is not so good and merchantable as it was before, for the grantee, having the sole trade, regards only his private benefit, and not the commonwealth.

(3) "It is done to the impoverishment of divers artificers and others, who before, by the labor of their own hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

See, also, *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 11 Pet. 607; *Slaughterhouse Cases*, 16 Wall. 102.

As used in the statute, however, the word "monopolize" clearly does not refer to grants by the government, but to the accomplishment of the same result by private endeavor; and the word "monopoly," in the meaning it had at the passing of the act, and has now, is not confined to grants by the government. The essential idea of an unlawful monopoly is found not so much in the creating of a very extensive

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business in the hands of a single control as in the idea of preventing all other persons from engaging in such business, and thereby stifling competition. The evil of the grants from the crown lay not in the fact that they gave to the grantee a right to manufacture and sell, but in the fact that they prevented other persons from manufacturing and selling the same article. The evil is not the enlargement of one person's trade, but the destruction of the trade of all other persons in the same commodity.

(1) If A. and B. enter into an agreement to restrain trade for the purpose of creating a monopoly by destroying all competition, either by buying out all competitors or by driving them out of business, such agreement is illegal and void.

(2) A fortiori, an agreement to restrain trade for the purpose of creating a monopoly which looks to the crushing out of all competition by an unlawful means, whether criminal or otherwise, is invalid.

It is clear that monopolies have always been unlawful at common law. The difficulty is to distinguish between such unlawful monopolies and lawful rivalry in business. The following cases point out this line of distinction: *Stanton v. Allen*, 5 Denio, 434; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *Handy v. Railroad Co.*, 31 Fed. Rep. 689; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1; *Dolph v. Machinery Co.*, 28 Fed. Rep. 553; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. Rep. 798; *Manufacturing Co. v. Klotz*, 44 Fed. Rep. 721; *More v. Bennett*, (Ill. Sup.) 29 N. E. Rep. 888.

SECOND.

RELATION OF THE UNITED STATES GOVERNMENT AND OF THE UNITED STATES COURTS TO THE SUBJECT-MATTER OF THE STATUTE.

(1) The congress of the United States is invested by the constitution with the power to regulate commerce between the several states, and with foreign nations, and with the Indian tribes. It has no power over commerce, except such as is thus given to it by the constitution, and the United States courts have, and can have, no jurisdiction over any offenses against commerce, unless it be such as congress is given the power to regulate and control. *In re Greene*, 52 Fed Rep. 104.

Interstate and foreign commerce being national in character, it has been [612] held that the power given to congress to regulate such commerce is exclusive, and implies a prohibition against any restraints upon such commerce. This prohibition has been enforced in many cases where the United States supreme court have held laws of the states unconstitutional and void, on the ground that they amounted to a restraint upon interstate or foreign commerce.

(2) There are no crimes at common law against the United States, and the criminal jurisdiction of the United States courts is limited to crimes created by statutes of the United States. Prior to the passage of the act here under discussion, there was no statutory provision of the United States making contracts, combinations, or conspiracies in restraint of or to monopolize interstate or foreign trade crimes against the United States, so that the United States courts could have no jurisdiction over that subject-matter even if such contracts, combinations, or conspiracies were criminal at common law or under state statutes.

(3) Prior to the passage of this act there was no provision giving to the United States courts even civil jurisdiction over contracts,

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combinations, or conspiracies upon the sole ground that such contracts, combinations, or conspiracies affected interstate or foreign trade or commerce; and such courts, therefore, had only such jurisdiction over these matters as might vest in them by reason of other circumstances, such as differences in citizenship.

(4) Under the power to regulate commerce among the several states it has been held that congress has the power to regulate the transportation of individuals, of property, and of communications, and also all instruments of such transportation and communication; and that transportation of property begins when the property is delivered to a common carrier for transportation to another state, and does not end until such property has completed its transportation, and has become a part of the general property of the state to which it is sent. And a state may not, even for the purpose of supposed self-protection, interfere with transportation into or through the state beyond what is absolutely necessary for its actual self-protection, and within the scope of its police power. See *Henderson v. Mayor*, etc., 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465, 472. The extent of this grant to the federal government is further seen in the following cases: *Gibbons v. Ogden*, 9 Wheat. 1; *Welton v. State of Missouri*, 91 U. S. 275; *Walling v. People of Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Letsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865; *Trade-Mark Cases*, 100 U. S. 96; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 328, 7 Sup. Ct. Rep. 1118.

It seems clear that what would be a regulation of commerce within the implied prohibition of the constitution, if attempted by a state, would be a sufficient object of a conspiracy by individuals to make it "in restraint of trade among the states." Clearly it would be obnoxious to the prohibition of the constitution for a state to pass a law that certain nonresident cash-register companies should not be allowed to sell cash registers in the state. If this would be unconstitutional when done by a state, clearly it would be a restraint of trade among the states when attempted by individuals so as to make a conspiracy to accomplish it a conspiracy in restraint of trade among the states. The conspiracy in the present case was to prevent certain corporations from carrying on the business of manufacturing and selling cash registers; and it is alleged that said corporations were carrying on this business among the several states, so that the prevention would operate necessarily and directly to restrain interstate trade in such cash registers in the same way that the state regulation did in *Letsy v. Hardin* and *Robbins v. Taxing Dist.*, *supra*. This, however, is a question to be determined at the trial.

(B) EVILS TO BE REMEDIED.

Undoubtedly a prominent evil to be remedied in the minds of the framers of the statute was the concentration of the entire business of the country in certain articles in such a manner as to prevent others from engaging in the same business, and thereby to prevent and stifle competition. As stated in the [613] title, it aims to "protect trade and commerce from unlawful restraints and monopolies;" and the evil of a monopoly lay in the prevention of others, either by prohibition from the sovereign power, or by power of individuals, from exercising the same trade. When, therefore, the statute made it criminal to conspire to monopolize, it did not intend to make it criminal for two or more persons to unite in developing their own business by lawful means, nor for one person to sell out his business to another or to others, provided that the prevention of others from engaging in the

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same business was not contemplated. It did, however, intend to make it criminal to conspire to obtain the sole control of any business by means of preventing others from engaging in that business, and, a fortiori, it is so intended where the means of prevention contemplated were of an unlawful character.

(C) THE REMEDY PROVIDED.

I. The most narrow effect that can be suggested for this act is that it makes certain acts which were criminal at common law crimes against the United States when such acts are directed to the restraint or monopolizing of trade or commerce among the several states or with foreign nations, and thereby gives to the United States courts jurisdiction of such crimes.

In this view the statute merely remedies the defect of the want of criminal jurisdiction at common law in the United States courts, which has been already pointed out. It is sufficient for the present case as regards several of the counts in the indictment, if this should be held to be the sole effect of the act. Thus a conspiracy to restrain trade by such unlawful means as are stated in this indictment would clearly be a criminal conspiracy at common law. *Crump's Case*, 84 Va. 927, 6 S. E. Rep. 620; *State v. Donaldson*, 32 N. J. Law, 157; *State v. Rowley*, 12 Conn. 112, 113; *State v. Crowley*, 41 Wis. 271. It is not necessary that each of the means alleged should be unlawful if taken alone, nor that they should all be proved. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. Rep. 997.

Among the means set forth in the indictment that are clearly unlawful are the following:

(1) Personal violence and threats of personal violence against the agents of the Lamson Company. See *Crump's Case*, *supra*, and cases there cited; *U. S. v. Lancaster*, *supra*.

(2) Unlawfully inducing the employees of and purchasers from that company to break their contracts, and maintaining them in actions brought for such breaches. *Bowen v. Hall*, *supra*; *Lumley v. Gye*, *supra*; *Evans v. Walton*, 36 Law J. C. P. 307; *Smith, Mast. & S.* 155. As to maintenance, see *Ray, Contract. Lit.* 293 et seq., and cases cited.

(3) By bringing and threatening to bring vexatious suits against the purchasers and prospective purchasers of cash registers from the Kruse, Lamson, Boston, and Union Companies. *Garret v. Taylor*, Cro. Jac. 567; *Kelley v. Manufacturing Co.*, 44 Fed. Rep. 19; *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.*, 41 Fed. Rep. 51.

(4) By falsely and fraudulently representing that the registers manufactured and sold by the Kruse, Lamson, Union, and Boston Companies contained defects that they did not in fact contain. See *Mogul Steamship Co. v. Macgregor, Gow & Co.*, *supra*.

(5) By frightening such purchasers and prospective purchasers from said companies by means of the acts, threats, and misrepresentations aforesaid. *Tarleton v. McGawley, Peake*, 270; *Crump's Case*, *supra*.

It needs no argument to show that a conspiracy to restrain or to monopolize trade by such means would be criminal at common law.

That the statute must be construed more broadly than this, however, is clear from the fact that contracts and combinations in unlawful restraint of trade were not criminal at common law, and this act is clearly intended to make them criminal.

II. The statute was intended to, and does, go further. It makes certain acts which are the subject of civil actions at common law, when directed to the restraint or monopolizing of trade or commerce

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between the several states or with foreign nations, crimes against the United States, thereby giving the United States courts jurisdiction over them. This construction again, how- [614] ever, is not broad enough, since to suit the statute it also would practically eliminate the words "contract" and "combination," since neither a contract nor a combination in restraint of trade is civilly actionable at common law.

III. The act goes still further, and makes contracts and combinations which are illegal in the sense of nonenforceable at common law, crimes against the United States when directed to the restraint or monopolizing of trade or commerce among the several states or with foreign nations.

That all three of these effects were intended appears from the act itself, since in no other way can all the terms of the act be given effect, and may also be shown by a reference to the debates in congress when the bill was pending. In the debates in the senate a number of cases are cited as showing what was meant by "restraint of trade" and "monopoly," all of which were civil, and not criminal, cases, and include the principle of the third proposition above laid down. Among these cases were *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *Craft v. McConoughy*, 79 Ill. 346; *Handy v. Railroad Co.*, 31 Fed. Rep. 689; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658.

(D) THE TRUE REASON OF THE ACT.

It thus appears that the true purpose and effect of the act were to remedy the injurious effects of unlawful restraints and monopolies upon trade and commerce so far as congress had the power so to do; that is to say, so far as they were directed against interstate or foreign commerce, its purpose being correctly stated in the title of the act, namely, "An act to protect trade and commerce from unlawful restraints and monopolies."

SUFFICIENCY OF THE INDICTMENT.

I. So far as charging a conspiracy is concerned, the language follows the ordinary language used for that purpose, and is sufficient.

II. The general allegation of threats, intimidation, and molestation is sufficient. *Reg. v. Rowlands*, 17 Q. B. 671; *Com. v. Dyer*, 128 Mass. 70. When the charge was that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud," it was held sufficient. *Rea v. De Berenger*, 3 Maule & S. 67; *Wood v. State*, 47 N. J. Law 461, 1 Atl. Rep. 509; *Com. v. Fuller*, 132 Mass. 563; *Com. v. Andrews*, Id. 263; *Rea v. Gill*, 2 Barn. & Ald. 204; *U. S. v. Stevens*, 44 Fed. Rep. 132; *U. S. v. Gardner*, 42 Fed. Rep. 829; *Sydserff v. Reg.*, 11 Q. B. 245; *Latham v. Reg.*, 9 Cox, Crim. Cas. 516.

The gist of the offense is the conspiracy. The unlawful object or means merely give character to the conspiracy itself, and show it to have been unlawful. *Rea v. Journeymen Tailors*, 8 Mod. 11; *State v. Glidden*, 55 Conn. 46, 8 Atl. Rep. 890. Hence the offense is complete though nothing be done in execution of the conspiracy. *Rea v. Spragg*, 2 Burrows, 993; *Rea v. Rispal*, 3 Burrows, 1321; *Collins v. Com.*, 3 Serg. & R. 220; *Com. v. Warren*, 6 Mass. 74; *The Poulterers' Case*, (1611.) 9 Coke, 55, Moore, 813; *Rea v. Edwards*, (1795.) 2 Strange, 707; *Rea v. Eccles*, (1783,) 1 Leach, 274; *Rea v. Gill*, (1813,) 2 Barn. & Ald. 204. Hence, also, it is unnecessary to set out the means when the end itself is unlawful. *People v. Barkelow*, 37 Mich. 455; *Com. v. Eastman*, 1 Cush. 190; *State v. Stewart*, 59

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Vt. 273, 9 Atl. Rep. 559; Bish. Dir. & Forms, § 301. In the present case the means are set out, and in some of the counts with the utmost particularity.

The unlawful means set out show—

(1) That the conspiracy alleged was unlawful, and even criminal, at common law.

(2) That the restraint of trade was real and unlawful, since clearly such unlawful acts would not tend to encourage the trade of one party while discouraging that of the other. That they would tend to enable the party committing them to afterwards monopolize the trade by independent acts clearly only aggravates the offense.

(3) That the conspiracy was unlawful, and even criminal, "conspiracy in restraint of trade" at common law.

They thus show that the conspiracy alleged was the conspiracy intended by the statute, even if the narrowest construction be given to the language [615] of the statute. If there was, as the government contends, an offense at common law known as "conspiracy in restraint of trade," it was clearly exactly the offense set forth in this indictment. If, as contended by the defendants, there was no common-law offense of that name, precisely the same result is arrived at by considering the words of the statute separately, and giving to them their lawful common-law meaning. The defendants' argument that the words "conspiracy in restraint of trade" are to be limited so as to read "conspiracy in restraint of trade by contractual means," is wholly unwarranted by any principle of construction. In this view the word "conspiracy" adds nothing to the word "combination." The rule that every word of a statute is to be given effect, where possible, is too familiar to need a full citation of authorities. *U. S. v. Hartwell*, 6 Wall. 385, 395, 396; *Montclair v. Ramsdell*, 107 U. S. 147, 152, 2 Sup. Ct. Rep. 391.

III. The indictment sufficiently alleges that the object of this unlawful conspiracy was in restraint of trade.

It not only alleges this in all the counts, in the language of the statute, but in certain of the counts also alleges broadly that this object was to hinder and prevent certain named corporations from carrying on the business of manufacturing and selling cash registers; and in certain other counts alleges that it was the object of the conspiracy to ruin and destroy the business of said corporations, then being carried on by them; and in other counts that it was the object to hinder and prevent all corporations other than the National Cash Register Company from carrying on said business, and to ruin and destroy the business of such other corporations then being carried on by them. That the successful accomplishment of such objects as these would result in not only restraint of such trade, but also in the monopolizing of it, is clear; and such objects are sufficient to make the conspiracy criminal, even at common law, especially when, as is alleged in this indictment, they are intended to be accomplished by unlawful and criminal means.

IV. The indictment sufficiently charges that the trade or commerce which it was the object of the conspiracy to restrain and monopolize, was "trade or commerce among the several states." This is specifically alleged in the words of the statute in all the counts. In all the counts, also, it is either specifically alleged or necessarily implied that there was in existence at the time of the conspiracy a trade or commerce in cash registers among the several states, that the defendants knew this, and that the object of the conspiracy was to restrain this specific existing trade. Some of the counts go still further, and give the names of the corporations which were engaged in such

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trade, and charge that the object of the conspiracy was to restrain the trade then carried on by said named corporations in cash registers among the several states. This language is clear, and as definite as the nature of the case will allow.

The statute was intended to cover a conspiracy the object of which was a general restraint or monopolizing of any trade which was of an interstate character. The conspirators would not naturally in such a case specify, even to themselves, the specific interstate transactions which it would be their object to restrain or monopolize, but would formulate the general intention and plan to restrain and monopolize all the trade among the states in a certain given subject-matter; for example, cash registers. The allegations are sufficient to show that the restraint and monopolizing contemplated were unlawful; that is, that they contemplated the prevention and destruction of trade by means which would not involve the corresponding encouragement of the trade of others. It is not material whether it appears on the face of the indictment that the means alleged are naturally calculated to affect interstate trade or not. It is distinctly alleged that it was the intent of the conspiracy to restrain and monopolize interstate trade. The means are only alleged to show the unlawful character of the restraint contemplated, not to show the object of the conspiracy to have been against interstate trade. It is submitted, however, that the means alleged are such as would naturally affect interstate trade when directed, as in this case, against corporations engaged in interstate trade, and that the fact that they would also affect domestic trade is immaterial; and this upon the same principle upon which it is held that a state cannot tax interstate commerce even though at the same time it tax domestic commerce to the same extent. *Letsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Robbins v. Tazewell Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592. The means alleged are such as would necessarily prevent the corporations engaged in said cash-register business from transporting said registers from one state into another, and selling them in the latter state.

All the elements required by the statute are therefore sufficiently alleged.

Elihu Root and John D. Lindsay, (also in support of the indictment,) in the interest of certain private individuals.

FIRST.

In conspiracy the gist of the offense is the combination; and, when conspiring to do a particular thing is made criminal by statute, a charge of a conspiracy to do that thing is a complete and sufficient description of the offense. Neither the means by which the conspirators intend to do the thing nor overt acts towards the doing of it need to be alleged. Neither means nor overt acts enter into the description of the offense unless expressly made an element of the offense by the statute. If the statutory description of the crime is conspiring to do a thing by unlawful means, then the unlawful means must be set out. If the statutory description is a conspiring to do a thing and an overt act, then the overt act must be set out. In the one case the unlawful means, and in the other the overt acts, are elements of the offense which necessarily enter into its description, and must be averred; otherwise they need not be averred. The rules upon this subject are very fully discussed in *Com. v. Barger*, 37 Leg. Int. 274, July 2, 1880, by Hare, P. J. See, also, *Com. v. Hunt*, 4 Metc. (Mass.) 125; *Ree v. Gill*, 2 Barn. & Ald. 204; 2 Whart. Crim. Pl. (4th Ed.)

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625, 628; *U. S. v. Donau*, 11 Blatchf. 168; *Oarew v. Rutherford*, 106 Mass. 1; *Com. v. Dyer*, 128 Mass. 70; *Reg. v. Rowlands*, 17 Adol. & E. (N. S.) 671; *U. S. v. Dennee*, 3 Woods, 47; *U. S. v. Milner*, 36 Fed. Rep. 890; *U. S. v. Dustin*, 2 Bond, 332; *Com. v. Eastman*, 1 Cush. 190; *Com. v. Shedd*, 7 Cush. 514.

It is also the rule, as shown by the foregoing authorities, among many that, where the character of the means to be employed is an element of the offense, only a general description of the means bringing it within the statutory requirement is necessary, and not a specific enumeration of particular means, e. g. false pretenses need not be set out.

SECOND.

It has been held, however, that this act does not describe the offenses which it denounces with such certainty and precision as to make a description of the offense charged in the bare words of the act sufficient. There must be included in the description of the offense such further averments of fact as to show that the conspiracy charged was, indeed, the conspiracy which congress intended to make criminal. See various decisions upon the indictment in *U. S. v. Greenhut*, in the northern district of Ohio, (51 Fed. Rep. 205;) in the southern district of New York, (Id. 213;) in the southern district of Ohio, *In re Greene*, (52 Fed. Rep. 104.)

This necessity of further averment, in addition to the words of the statute, arises from the fact that congress used in the statute terms which, taken in their most general sense, would include acts of the most innocent character, so conformable to the general principles of law that congress could not have intended to declare them criminal. Thus there is a great variety of contracts which are essential to the legitimate conduct of business, and which are uniformly enforced by our courts, both of law and of equity, and yet which are to some extent in restraint of trade. It is not to be supposed that congress intended to make them criminal. Thus, also, the essential element of private property is monopoly. Our whole system of law relating to property is designed to maintain and protect that monopoly. Congress, of course, did not intend to make it criminal.

In describing offenses under this statute it is, therefore, necessary to include such averments as will show that the restraint of trade, or the monopoly which is the object of the conspiracy, is the kind of restraint or the kind of monopoly which congress intended to denounce. To thus make apparent [617] the character of the object of the conspiracy and bring it within the class of objects which congress intended to make criminal is the sole function of all averments in the indictment in addition to the charge in the words of the statute; and, if the object thus described is the object which congress intended to include within the words used in the statute, the indictment is sufficient.

THIRD.

The fundamental question upon the first set of counts is whether the destruction of a competitor's trade in the manner described is a restraint of trade within the intent of the provision of the first section of the act which makes a conspiracy in restraint of trade criminal.

I. To ascertain what constitutes a contract, combination, or conspiracy in restraint of trade, recourse must be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. *In re Greene*, 52 Fed. Rep. 104.

II. The statute enumerates three distinct facts, viz.: (a) Con-

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tracts in restraint of trade; (b) combinations in the form of trusts or otherwise in restraint of trade; (c) conspiracies in restraint of trade.

Each one of these points to a separate and distinct class of cases in which, prior to the passage of the act, the courts of England and America had condemned acts injurious to the public interest, because of their effect upon trade. In all three the principle of decision and the ground of condemnation had been that they interfered with the public's right to have trade and competition in trade free and unrestricted.

(1) The first class of acts included the ordinary contracts which were declared to be void as against public policy, because some of the contracting parties thereby prevented themselves from pursuing their occupations, and the public was thus deprived of their contribution to the competition therein.

Judge Bradley states the rule regarding these cases in *Navigation Co. v. Winsor*, 20 Wall. 64, in these words:

"There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy."

(2) The second division of the statute, viz. combinations in the form of trusts or otherwise in restraint of trade, points to a class of cases which, while it may include the first class, includes also a great number of combinations distinguished from ordinary contracts in restraint of trade by a broad line of demarcation. These are combinations in which there is no contract, which either by its express terms or by implication binds the contracting party not to exercise his trade, or not to compete freely with others, but which are declared by the courts in violation of public policy, because they accomplish the effect of preventing freedom of trade and competition. As a rule the agreements and arrangements by which these combinations are formed are themselves, in their terms and requirements, of the most harmless and innocent character. It is the effect, and the effect alone, upon the public interest which causes them to be declared against public policy. The following are illustrations of this class: *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Arnot v. Coal Co.*, 68 N. Y. 558; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Clancey v. Manufacturing Co.*, 62 Barb. 395; *People v. North River Sugar Refinery Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; *People v. North River Sugar Refinery Co.*, 121 N. Y. 582, 24 N. E. Rep. 834; *Hilton v. Eckersley*, 6 El. & Bl. 47; *Craft v. McConoughy*, 79 Ill. 346; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Biscuit & Manuf'g Co. v. Klotz*, 44 Fed. Rep. 721; *Hoff- [618] man v. Brooks*, 11 Wkly. Law. Bull. 258; *State v. Standard Oil Co.*, (Ohio Sup.) 30 N. E. Rep. 279.

So long as the arrangements or agreements in regard to trade made by a combination produce the injurious effect, no form of contract or devise to produce that effect indirectly avails to escape the consequences.

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(3) The third division of section 1—"conspiracies in restraint of trade"—refers us to a class of cases in which the effect upon trade is produced, not by contract obligations binding the parties not to compete, not by pooling arrangements which make it against the party's interests not to compete, but by preventing others from carrying on trade.

An essential element in these cases is that the prevention shall be, not by means of competition itself in the ordinary course of business,—one competitor driving out another by fair competition,—but that the prevention shall be by unfair means, which are themselves private injuries to the person whose trade is interfered with. Conspiracies to destroy or injure another's business by such means have always been actionable because of the private injury, and indictable because of the public injury, upon the same grounds and for the same reasons which have led the courts to declare contracts and combinations accomplishing the same effect void as against public policy. The law upon the subject is very fully presented in *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. Div. 598, 605, (1892.) App. Cas. 25.

Conspiracies among laborers to boycott, to coerce their employers, to prevent other laborers from working, are familiar illustrations of this principle. See *Rea v. Eccles*, 1 Leach, 274; *Rea v. Bykerdyke*, 1 Moody & R. 179; *Reg. v. Hewitt*, 5 Cox, Crim. Cas. 162; *Reg. v. Duffield*, *Id.* 404; *Reg. v. Drutt*, 10 Cox, Crim. Cas. 592; *Reg. v. Rowlands*, 5 Cox, Crim. Cas. 436; *People v. Fisher*, 14 Wend. 11; *People v. Melvin*, 2 Wheeler, Crim. Cas. 262; *Master Stevedores' Ass'n v. Walsh*, 2 Daly, 1; *People v. Wilzig*, 4 N. Y. Crim. R. 403; *State v. Stewart*, 59 Vt. 273, 9 Atl. Rep. 559; *Crump's Case*, 84 Va. 927, 6 S. E. Rep. 620; *State v. Donaldson*, 32 N. J. Law, 157; *State v. Glidden*, 55 Conn. 76, 8 Atl. Rep. 890; *People v. Walsh*, 15 N. Y. St. Rep. 17; *Steph. Dig. Crim. Law*, 390; *People v. Everest*, 51 Hun, 19, 3 N. Y. Supp. 612.

(4) It appears from the foregoing review that at the time the act now under consideration was passed restraint of trade, as known to the law, was preventing any one from freely exercising his trade. That this prevention was held to be against public policy, because it deprived the public of the benefit of the prevented industry and of its competition with others; that all contracts which had that effect were held to be void, because they produced that public injury; that all combinations which had that effect, directly or indirectly, were held to be unlawful, because they produced that injury; that all conspiracies to produce that effect upon others by threats, intimidation, fraud, and other similar means were held to be criminal, because they produced that same public injury.

Clearly these were the conspiracies intended and aptly described in the language of the first section of the statute.

(5) The means described in general terms in the first count of the indictment, and particularly enumerated in the fourth and fifth counts, are the very means which have always been held to make interference with business unlawful, and to make a conspiracy to interfere with business through other instrumentality a criminal conspiracy. *Mogul Steamship Co. v. McGregor, Gow & Co. supra.*

(6) The prevention of competition by unlawful interference with the business of competitors was one of the ways of producing this kind of public injury, which was at the time this act was passed well known through judicial decisions, and it was present in the mind of congress when it passed the act. See 21 Cong. Rec. pt. 3, pp. 2456-2458, 2598. It is part of the judicial history of the country that, prior to the passage of the act, several of the directors of the

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Standard Oil Company had been convicted in the state of New York of a conspiracy to drive one of its competitors out of business by violent and dangerous methods, the conspirators going so far as to attempt the destruction of the competitor's property. See *People v. Everest*, 51 [619] Hun, 19, 3 N. Y. Supp. 612. The indictment in that case was for a conspiracy (under section 168 of the New York Penal Code) to commit an act injurious to trade.

It will be observed from the foregoing extracts that the cases therein referred to that congress had in mind as one of the evils at which this act was aimed the suppression of competition as well by means operating upon other persons than the guilty combiners as by the direct means of the agreement entered into between those combiners.

(7) Counsel for the defendants has referred to many state statutes which he says were designed to apply only to offenses by way of contract operating only upon the persons combining. He omits to observe that in all these states combination to produce the same effect by unlawful means operating upon others were already criminal at common law, and by already existing statutes; e. g. the statute of New York, making it a criminal "conspiracy to do any act injurious to trade or commerce." It was, therefore, unnecessary for the states which had existing statutes of this description, and which had a common law, to include in their acts designed for the protection of free competition in provisions affecting such conspiracies as are shown in the present indictments.

But when congress undertook to assert over interstate commerce the same protection which the common law and the statutes of the several states gave to commerce within their respective limits, there is no warrant whatever for saying that congress did not mean to cover the entire field as broadly as the whole body of common law, and legislation in the respective states covered it within their respective limits. The word "conspiracy" is appropriately added to the words "contract" and "combination in form of trust or otherwise," to accomplish this complete design.

(8) The idea that there is any distinction in substance between what counsel for the defendant calls "contractual restraint of trade" and the restraint charged in this indictment is wholly illusory, for conspiracy is a contract just as much as any illegal combination. The only element of contract in either is the agreement of the parties to accomplish a given result. That agreement may or may not include specifically the means by which they intend to accomplish it. This element of agreement is, indeed, common to all the offenses denounced in the first section of the act. It is to be found in the contracts, in the combinations, and in the conspiracies there described. It is, however, the only contractual element which is essential to any of the offenses described in that section, and this same contractual element must necessarily be shown in every case of criminal conspiracy. All the authorities which had declared the law of trusts and trust combinations at the time the act was passed agreed that in declaring that the illegal object to accomplish which the minds of the parties met together, made their agreement illegal, wholly irrespective of its form, or of the means by which they intended to accomplish the object. It seems quite absurd to contend that when congress struck at an evil which the courts had declared rendered every combination which produced it illegal, entirely irrespective of its form or avowed purpose, congress nevertheless meant to except combinations which produced that same evil by means already recognized as unlawful. The court is asked by the defendants to deprive an express substantive provision of the statute of all meaning whatever, to say that it adds nothing to the other provisions of the statute, for the purpose of inferring that

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Congress meant to make it criminal to produce the given result of preventing competition by means otherwise lawful, and not to make it criminal to produce the same result by means otherwise unlawful.

FOURTH.

The fundamental question upon the second set of counts is whether a monopoly acquired by destroying the trade of competitors in the manner described is a monopoly within the intent of the provision of the second section of the act, which makes a conspiracy to monopolize criminal.

In the debate upon this act in the senate, Mr. Edmunds quoted from Webster's Dictionary the following definition of the verb "to monopolize:" "To engross or obtain by any means the exclusive right of, especially the right of trading to any place or with any country or district; as to monopolize the [620] India or Levant trade." 2 Pike. Hist. Crime, p. 102. And see St. 23, James I. cc. 331-333; 4 St. at Large, p. 734; *The Case of Monopolies*, 11 Coke, 85a.

The words of the statute are broad enough to include all appropriation of trade to the exclusion of others. It is equally manifest, however, that from the application of those words must be excluded all appropriation of trade to the exclusion of others which is done under warrant of law, such as the obtaining of a monopoly by letters patent, the obtaining of a monopoly by the ordinary purchase of property, the obtaining of a monopoly by the ordinary process of fair competition and trade as the result of superior intelligence, industry, or activity. Starting with the original well-understood and commonly received meaning of the word, and applying this process of exclusion, we find that there remains a class of monopolies with which the courts have of recent years become very familiar, which are created wholly without warrant of law, which have all the characteristics and all the injurious effects of the famous monopolies of Queen Elizabeth's time, and which are accomplished by a more or less direct violation of the rules above considered against restraint of trade. The judicial condemnation of such monopolies is an extension of the principles relating to restraint of trade. The monopoly is treated as the extreme evil resulting from restraint of trade upon a large scale.

This view of monopolies is illustrated and fully shown in the cases relating to combinations cited under the third head of this brief. Whatever else may or may not be included within the term "to monopolize," as used in the statute, it is safe to say that it does include the accomplishment of the effects above described by any acts which constitute an unlawful restraint or prevention of trade.

FIFTH.

The counsel for the defendants says that, unless the construction for which he contends is put upon the act, its range is almost unlimited; and he goes so far as to assert that, under the theory upon which this indictment is drawn, a very large proportion of all the serious crimes within the states could be brought within the federal jurisdiction. His argument for the assertion rests upon certain propositions of law relating to criminal responsibility for crimes resulting unintentionally from unlawful confederacies.

A conspirator is held equally guilty with his confederate for a murder (or other higher offense than the one contemplated) committed by the latter in the perpetration of a preconcerted offense by both only when the higher offense is the natural result of the crime intended, or is committed as a means of successfully effecting the

Root and Lindsay, in support of indictment.

intended purpose. So, where one of the conspirators deviates from the original plan, or undertakes to do something out of the range of the purpose contemplated, the other is not criminally responsible for this result. Our only purpose in referring to these propositions is to express our dissent from the view taken by the counsel for the defendants,—that, upon our construction, the commission of any act, however remotely affecting or interfering with interstate commerce, would render the perpetrator of such act liable to prosecution under the act of congress, no matter whether the interference was intentional or otherwise. It is not necessary to discuss this point.

We allege a conspiracy to do certain things which we contend do restrain trade. The question of whether the acts committed by the conspirators are intentional or not is one for the trial. If the acts the government proposes to prove as evidence of the conspiracy were unintentionally done, or were committed without any design of accomplishing a result that, in contemplation of law, would constitute a restraint of trade or monopoly, within the meaning of the act, proof to that effect would be proper matter of defense.

In answer to the remaining portion of defendants' argument on this head, it is only necessary to say that the jurisdiction of the federal courts is not necessarily exclusive. An act may be a violation both of the laws of the United States and of the state where it is committed; and it does not affect the question of federal jurisdiction that the defendants intended to use means themselves the subject of prosecution under the state laws.

SIXTH.

It is necessary that the restraint of trade charged should be a restraint of trade among the several states.

[621] Upon that point it seems sufficient to say that it is so charged. There is no doubt, uncertainty, or question in the language of the statute which describes that element of the offense. "Trade among the several states" has been described and defined by the supreme court of the United States in numerous cases. *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *Ficklen v. Tasing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810. The language of the statute obviously and clearly applies to all trade coming within that description. There is not one kind of trade among the several states to which the statute was intended to apply, and another kind to which it was not intended to apply. As there is no uncertainty or indefiniteness in regard to this element of the offense, the charge, which states this element of the offense in the words of the statute, is sufficient.

In some of the counts, however, the indictment does go beyond the necessities of pleading, and charges not only that the conspiracy was in restraint of trade and commerce among the several states, but that it was to destroy that trade, and that it was to destroy that trade by practices which, under the principles above stated, would constitute the destruction,—the very kind of restraint of trade which congress had in mind.

There can be no question under this statute whether the means which the conspirators had in mind were adequate or appropriate to accomplish the destruction of trade among the states. As we have seen, the means are not an essential element of the offense. They have no relevancy to the charge, except as they may serve to characterize the nature of restraint proposed by the conspirators, and show that it is the kind of restraint which congress had in mind. So long as the restraint was of the kind which congress had in mind,

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then it is immaterial whether it was in fact possible that interstate trade could be destroyed by it. The offense of conspiring to destroy interstate trade by that particular kind of restraint was committed when the agreement of the conspirators took place, whether they ever have or ever can or could accomplish their object.

Each of the three elements of the offense is clearly and definitely charged. First, the conspiracy; second, the restraint, which is shown to be the kind of restraint which congress had in mind; and, third, the thing to be restrained, which is charged to be the thing which the act clearly and definitely described. 2 Bish. St. Crimes, (8th Ed.) § 202.

H. W. Chaplin, for defendants.

COMMERCE AMONG THE SEVERAL STATES.

This act must rest on the constitutional power to regulate commerce with foreign nations and among the several states, and those sections which are pertinent to the present controversy must rest upon the power to regulate commerce among the states. The matter with which we are dealing is "commerce among the several states." It is important, at the outset, to consider, in a general way, the conventional meaning of that phrase in federal jurisprudence, the outline of the field, as fixed by federal decisions, and the way in which, and the extent to which, the federal government can deal with it.

The meaning of the phrase, "commerce among the several states," in the federal constitution, is a meaning quite different from the meaning of those words as mere English words. The word "commerce," it is not necessary here particularly to discuss. It includes intercourse of many, if not all, lawful kinds, and is broader than the word "trade." The constitutional phrase, however, "commerce among the several states," has a highly artificial, conventional, and refined meaning, fixed by principles of public policy and statesmanship, and in view of the complex character of our government, and the relative rights and duties of the states and general government.

Lewis, Federal Power Over Commerce, p. 10; *Paul v. Virginia*, 8 Wall. 168, 183; *Mobile v. Kimball*, 102 U. S. 691, 702; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *Letsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Gibbons v. Ogden*, 9 Wheat. 1, 4; *Kirkland v. Hotchkiss*, 100 U. S. 491; *Slaughterhouse Cases*, 16 Wall. 36, 75, 79; *License Tax Cases*, 5 Wall. [622] 462; *Mugler v. State of Kansas*, 123, U. S. 623, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6.

Moreover, it is true of most, if not all, of the grants of power in the federal constitution, that the definition of them is not only arbitrary, and fixed by principles of public policy, but that it is not fixed even by any generic distinction, even an arbitrary one, but is fixed merely by degree of proximity or remoteness to state and federal rights. *U. S. v. Dewitt*, 9 Wall. 41; *U. S. v. Fox*, 94 U. S. 315; *Trade-Mark Cases*, 100 U. S. 82; *Picklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 13, 11 Sup. Ct. Rep. 876; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *U. S. v. Hall*, 98 U. S. 343.

Every citizen of our states has a dual political status. In one aspect, he is a citizen of the United States. In another aspect, he is a citizen of his state. It does not follow from the fact that he is a citizen of the United States that congress can protect him against

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all forms of fraud or violence or other wrong; nor, from the fact that he is a citizen of the state, that the state can so protect him. Congress can protect him only in that range and field of his life and affairs in which he presents himself as a citizen of the United States, and not as a citizen of his state. His state can protect him only in that range and field of his life and affairs in which he presents himself as a citizen of his state, and not of the United States. The line between his federal and his state citizenship is an arbitrary line, and often a hazy and indefinite line, and it is always a line of degree of proximity or remoteness. Nevertheless, it is a constitutional line, which neither the federal government nor the state can cross. *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Fox*, 94 U. S. 315; *Logan v. U. S.* 144 U. S. 263, 12 Sup. Ct. Rep. 617.

CONTRACTUAL CHARACTER OF THE STATUTE.

Trade statutes have at different times been passed in various jurisdictions. Some of them have been aimed at labor, some at capital, but the distinction between legislation against labor and legislation against capital has always been patent upon the face of the statutes. The ancient legislation against monopolizing and engrossing was legislation against capital.

The act of July 2, 1890, is directed at capital. It aims at dangers very generally supposed to have lately arisen out of enormous aggregations of capital. It aims at results effected, or to be effected, by combinations of capitalists and aggregations of capital. The evil aimed at in legislation against capital is evil of a contractual character, not an evil of mere fraud or violence. There was no general call for federal protection against an evil of the latter character. The act of 1890 was aimed at a growing tendency to combination by voluntary contract, in derogation of public right and public safety. It was at this, only, that the legislation was aimed; and it is this, only, which its words are to be construed to cover. Attacks upon commerce by mere fraud and violence, it is thus far left to the states to punish. This statute is not a Ku-Klux act. The "restraint" and the "monopolizing" of the statute are contractual restraint and monopolizing,—not mere interference with commerce, as by robbery, assault, champerty, bringing of suits, or other forms of violence, fraud or vexation.

The indictment proceeds upon the theory that the restraint and monopolizing of the statute, at least in the penal aspect of the act, are substantially equivalent to interference with trade, or at least to interference with the trade of rivals. Some of the counts allege conspiracy to interfere with or injure or ruin the business of persons apparently intended to be described as rivals, by mere fraud, violence, or other noncontractual means. The other counts do not specify the means. They therefore fail to allege contractual means. The pleader has completely missed the true scope and effect of the statute.

CONTRACT CRIMES.

The defendants' counsel think it proper to discuss, at the outset, the place which contract occupies in the criminal law, and to consider the characteristics of those crimes which may aptly be designated as contract crimes.

[623] A familiar instance of crimes of contract is the unlawful selling of intoxicating liquors. To make the offense, an actual contract of sale must have been made, and the questions where, when, and

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whether an alleged contract of sale was in fact made are determined, not by any rules of criminal law, but by the ordinary principles of the law of contracts. The questions of locus contractus, of principal and agent, of delivery, for example, are discussed and settled in liquor prosecutions precisely as in civil actions. *Com. v. Eggleston*, 128 Mass. 408; *Com. v. Burgett*, 136 Mass. 450.

A cash sale of liquors to a minor is not, under an ordinary selling statute, a "sale" to him, if in fact, although without the vendor's knowledge, he is buying for an adult. *Com. v. Lattinville*, 120 Mass. 385; *Com. v. Finnegan*, 124 Mass. 324; *St. Goddard v. Burnham*, Id. 578.

The element of true contract, in contract crimes, is well illustrated by cases upon English statutes aimed at the "putting off" of counterfeit money to a confederate. The offense of "putting off" is distinguished from the crime of uttering, in that an uttering, to be criminal, must be made to an innocent person, and does not necessarily imply a contract, while a "putting off" of forged paper implies a true contract of sale, gift, or barter, to be established like any other sale, gift or barter. In *Reg. v. Joyce*, (MS., O. B.,) Car. Supp. 184, the indictment (framed on St. 8 & 9, Wm. III. c. 26, § 6, for "putting off" counterfeit money) charged that five counterfeit shillings were paid and put off for two shillings. The proof was that five bad shillings were sold for half a crown. "Thompson, C. B., and Heath, J., held that, as this was a contract, it must be correctly proved as laid, and directed an acquittal." See, also, *Reg. v. Hedges*, 3 Car. & P. 410; *Reg. v. Wooldridge*, 1 Leach, 307; 1 East P. C. 180.

The crime of "obtaining goods by false pretenses" is a crime of true contract. If I secure goods by false statements, my crime will be "false pretenses" or larceny, according as I do or do not effect a meeting of minds, which actually passes title. If, on the one hand, I represent to a vendor that I am rich, and thereby induce him to sell me goods upon credit, there is a true contract of sale between us,—voidable, indeed, at the vendor's option, for the fraud, but none the less a true contract until avoided,—and my offense is "obtaining goods by false pretenses." If, on the other hand, I get goods by representing that I am A.'s servant, and that A. has commissioned me to buy the goods for him, and get them as upon a sale upon credit to A., there is no meeting of minds between the vendor and A. There is no meeting of minds between the vendor and me, to the effect that I am to be the purchaser on credit. There is therefore no meeting of minds at all, in true contract, and the offense is larceny. It is immaterial, in such case, that the supposed vendor intends to pass title, or thinks that he is passing title. The question is, not what he or the supposed purchaser intends or thinks, but is there, or is there not, a meeting of minds in contract? No contract, no crime. No reported cases pursue into greater refinement the question of contract or no contract than false pretense and larceny cases, close on the dividing line.

THIS STATUTE A STATUTE OF CONTRACT CRIME.

The act of 1890 is a statute of contract crime. Neither in its restraint nor in its "monopolize" provisions does it aim to punish anything else than (a) the making of contracts; or (b) the combining, conspiring, or attempting to make or to effect the making of contracts; or, possibly, (c) the combining or conspiring or attempting to support or enforce contracts. It is essential to guilt under it that a contract be made, or that contract results be the aim.

This is, in substance, the view which has been taken of the act in

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the judicial decisions which have thus far been made upon it, and is the logical result of the reasoning on which they are rested. If this were a small matter, the defendants' counsel would be quite well content to rest their argument upon those decisions. Since, however, no one of those cases is a decision of a court of last resort, or is a binding precedent upon this court, or is on all fours with the case at bar, the defendants' counsel, particularly in view of the importance of the present case, will proceed to consider various lines of [624] reasoning and authority which seem to them, independently of those cases, to require an exclusively contractual reading of the statute. The decided cases upon the statute will also be referred to at proper points in the discussion.

TECHNICAL TERMS IN THE STATUTE.

The use of technical words and phrases in the statute is such as necessitates the contractual construction. It is a familiar principle of statutory construction that, where a new statute uses words or phrases already having a settled technical signification in the law, these words or phrases in the statute are to be taken in such technical sense, unless the context makes such a reading impossible. E. g.

"Law of nations." *U. S. v. Smith*, 5 Wheat. 153.

"Utters." *U. S. v. Carll*, 105 U. S. 611.

"Embezzles." *U. S. v. Britton*, 107 U. S. 655, 669, 2 Sup. Ct. Rep. 512.

"Steal, take, and carry away." *Id.*

"Murder." *Ball v. U. S.*, 140 U. S. 118, 11 Sup. Ct. Rep. 761.

"Negotiable;" "Indorsement and delivery." *Shaw v. Railroad Co.*, 101 U. S. 557.

This principle is but an application of a broader principle, which finds expression, also, in the rule that statutes are to be presumed to depart as little as possible from the common law. *Shaw v. Railroad Co.*, 101 U. S. 557; *Brown v. Barry*, 3 Dall. 385.

A similar conservative principle is found in the rule that statutory expressions borrowed from the statutes of another jurisdiction are to be taken in the meaning of their original domicile, as defined there by judicial construction. *Railroad Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. Rep. 1334. This latter rule has just been applied to the interstate commerce act. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 282, 284, 12 Sup. Ct. Rep. 844.

Such legislation is extremely common with congress, and is, indeed, a distinguishing peculiarity of its legislation. The greater part of what may be called federal "lawmaking" legislation consists in the adoption, from time to time, and upon different subjects, by a mere summary reference, and often by terse and elliptic designation, of a complete title or head of the common law, civil or criminal, or of some other body of jurisprudence. The chief part of the federal criminal law exists only in this way. See cases cited above, and *Moore v. U. S.*, 91 U. S. 270, 273, 274; *Smith v. Alabama*, 124 U. S. 465, at page 478, 8 Sup. Ct. Rep. 564, at page 569.

It is a feature of the operation of this principle that the summary adoption by federal statute of a particular head or title of law, civil or criminal, brings in that head of law, with all its details and all its exceptions, and that the statute has in law precisely the same reading which it would have, should it, as would a detailed Code, rehearse at length, and minutely, all those details and exceptions. In *U. S. v. Carll*, cited above, a statute punishing, in terms, the "uttering" of forged federal paper, "with intent to defraud," was held to incorporate into the federal jurisprudence the

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common law of uttering, with all its limitations, and to require, therefore, as an element of the crime, (although not expressed in the statute,) knowledge that the paper was forged.

It is an equally well-settled principle that where a word has a well-known, settled, and technical (though recent) meaning,—not in the law, but in the language of a trade, or in common speech,—the word, in a new statute, will be given that meaning. *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Morrison*, Id. 108; *Greenleaf v. Goodrich*, 101 U. S. 278.

EFFECT OF WORD "TRADE" IN THIS STATUTE.

The word "trade" would seem, in its meaning as an individual word, to be a narrower word than "commerce," (Marshall, C. J., *Gibbons v. Ogden*, 9 Wheat. 1, 189; Miller, Const. c. 9.) and therefore, in this statute, is either synonymous with "commerce." Even if it were a broader word than "commerce," it could not operate more broadly than "commerce" in this statute, for the constitutional power of congress stops with "commerce." [625] The word "trade," therefore, in this statute, is either synonymous with "commerce," or narrower than it, and in either view it is, as a mere individual word, surplusage in the statute. The word "trade" must, however, be given effect, if possible. *Platt v. Railroad Co.*, 99 U. S. 48; *Market Co. v. Hoffman*, 101 U. S. 112.

It will be unnecessary here to discuss the question how far the "restraint of trade" of the common law is enlarged in its field of operation by its application in this statute to "commerce," in so far as "commerce" may be broader than "trade;" for, if anything in this indictment comes under the head of "commerce," it also comes under the head of "trade." Nothing set forth in this indictment lies in those outlying zones, if any, of commerce, which extend beyond the confines of trade.

TECHNICAL MEANING OF "RESTRAINT OF TRADE."

The phrase "restraint of trade," therefore, upon the principles discussed above, operates to evoke from the common law, and to introduce into the federal jurisprudence, a complete head or title of the common law. We come, then, to the question of what is meant in the common law by "restraint of trade."

This phrase, like many others, has at the common law two technical meanings,—a broader and a narrower. The broader is generic, and includes all technical "restraint of trade." The narrower is specific, and includes only unlawful "restraint of trade." The broader conveys no obnoxious suggestion. The narrower is of obnoxious signification. In both its senses the phrase means contractual restraint, and only contractual restraint,—restraint by contract, and only by contract. Both the broader and the narrower meaning are well set forth by Greenh. Pub. Pol. 683.

The phrase, "in restraint of trade," is almost always used in the common law in connection with the word "contract," or, less frequently, "combination." In its less common connection with the word "combination," the phrase merely indicates the joinder of a considerable number of persons in a contract; limiting one or more, but usually all of them. When, as often happens, the parties to a considerable combination in "restraint of trade" do not trust each other, and do not wish to have the burden of suing each other to enforce the contract, they often put their trade assets and plants into the hands of a stakeholder, who is to carry out the restraining contract, either

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according to a detailed scheme, or according to his discretion, and so make the operation of the restraint, as it were, automatic. The stakeholder, in such case, becomes, by operation of law, a trustee. The result of the proceeding is, within the meaning of the law word, a "trust;" and to this peculiar form of trust the common speech now applies, in an exceptional sense, and with a hostile signification, the word "trust." As to combinations in restraint of trade, see *Id.* 442-459.

CONSPIRACY IN RESTRAINT OF TRADE IN THE CRIMINAL LAW.

It remains to be considered whether the phrase "in restraint of trade," either alone or in connection with the word "conspiracy," or any other word, had in the criminal law a technical meaning broader than, or different from, its technical meaning in the civil law.

Such separate technical meaning in the criminal law, to be effectual here, would have to be a meaning generally recognized, and not merely a matter of personal or occasional nomenclature. If such a meaning existed in the criminal law, it would appear in the approved text-books,—old and new. In the following text-books the words and phrases, "restraint of trade," and "conspiracy in restraint of trade," do not appear (unless in some editions which the defendants' counsel have not seen) in the index, nor does the title "Conspiracy," although it covers conspiracies dealing with trade, allude to "restraint of trade." No one of these books, it is believed, uses the phrase, "conspiracy in restraint of trade:" 4 Bl. Comm.; Hawk. P. C.; Archb. Crim. Pr. & Pl.; Chit. Crim. Law; Rob. Crim. St.; Woolr. Crim. Law; Paley, Conv.; Carr. Crim. Law; Bish. Crim. Law; Bish. Crim. Proc.; Whart. Crim. Law; Whart. Crim. Pl.; Russ. Crimes; Davis, Crim. Law; Maugh. Law; Lewis, [626] Crim. Code; Washb. Crim. Law; May, Crim. Law; Lewis, U. S. Crim. Law; Lipp. Crim. Law; Heard, Crim. Law; Gabb. Crim. Law; Fish. Crim. Dig.; Pike, Hist. Crime.

The only instances of the use of the phrase, "conspiracy in restraint of trade," or "restraint of trade," in criminal law books, as far as the defendants' counsel can learn, are in the seventh edition of Roscoe's *Criminal Evidence*, in Steph. Dig. Crim. Law, (1877,) and Erle, *Trade Un.* The chapter in Roscoe on "Conspiracies in Restraint of Trade" was prepared by Sir James Fitzjames Stephen, as he tells us in his "Digest of the Criminal Law," (1877, note 18, p. 383.) Sir James Stephen had then been engaged for more than 10 years in the study of the criminal law from a scientific point of view, and chiefly with reference to legislation. Steph. Hist. Crim. Law, (1883,) preface. What he wrote in Roscoe was subsequently elaborated by him in his "History of the Criminal Law," without material change. The nomenclature, "Conspiracies in Restraint of Trade," in Roscoe, is therefore a personal nomenclature of a broad and scientific student of criminal law, looking more to the future than to the present or the past, and of such public and scholarly position as to be entitled, if he so desired, to make a slight change of nomenclature. The propriety, however, of his change of nomenclature, if there was such, does not make his phrase a technical nomenclature of the common law.

In his "Digest of the Criminal Law," (1877,) all that he says in the text upon this head is included in articles 390-392, and note 18. But what he there says begs the question how far violence is to be considered in the matter of "restraint of trade."

Erle on the Law Relating to Trade Unions is not a text book at all. It does not profess to be written peculiarly for lawyers, and is perfectly at liberty to use popular nomenclature. Moreover, it is a book

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written in support of a theory as to freedom of trade at the common law,—a theory which, as Mr. Justice Stephen shows, is erroneous.

An examination of the English Statutes relating to offenses against trade fails, with the exception of one preamble, to detect the use, in a criminal sense, of the phrase, "in restraint of trade."

(1720,) 7 Geo. I. St. 1, c. 13; (1725,) 12 Geo. I. c. 34; (1749,) 22 Geo. II. c. 27; (1772,) 12 Geo. III. c. 71; (1777,) 17 Geo. III. c. 55; (1795,) 36 Geo. III. c. 111; (1800,) 39 & 40 Geo. III. c. 106, repealing 39 Geo. III. c. 81; (1824,) 5 Geo. IV. c. 95; (1825,) 6 Geo. IV. c. 129; (1844,) 7 & 8 Vict. c. 24.

Preamble: "Whereas, it is expedient that such statutes, [forestalling and regrating,] and other statutes made in hindrance and in restraint of trade, be repealed." (1859,) 22 Vict. c. 34; (1875,) 38 & 39 Vict. c. 86. Here "restraint" is plainly contractual.

TECHNICAL MEANING OF "MONOPOLIZE"

The word "monopolize," and its noun, "monopoly," have in the law, and had at the time of the passage of the act, a technical meaning. In so far as they implied any exclusive privilege not resting upon a government franchise, or upon individual ownership of property, they involve the idea of contract. 4 Bl. Comm. 159; Ray, Contract. Lim. 210-245; Greenh. Pub. Pol. 670 et seq.; Ricks, J., *In re Corning*, 51 Fed. Rep. 205.

It is not, in the legal sense, "monopolizing," to raise upon one's own ground all the corn or wheat for the subsistence of a community. Like the terms, "restraint of trade," and "contract in restraint of trade," "monopoly" has, in the common law, a broader and favorable sense, including just and rightful monopolies, such as patents or copyrights, and a narrower and obnoxious sense, embracing only monopolies counter to law or public policy. "Monopoly" is limited, in its broader or favorable sense, to public franchise, private ownership, or contract. In its narrower and obnoxious sense, it is limited to unlawful contractual means. It is not monopolizing for a band of desperadoes to invade an isolated community, and rob it of its winter's store. He only monopolizes, in the invidious legal sense of the word, who with wrongful intent buys up, or attempts to buy up, the whole, or substantially the whole, of a given commodity in a given locality, or at least contracts, or attempts to contract, for the control of it. Cases cited above. Section 2 of the statute, therefore, undertakes to punish nothing but the making of a particular form [627] of contract,—usually a contract of purchase,—and conspiracies, and attempts to make, or to promote the making of, or perhaps to enforce, such contracts. This effect of these technical words in the statute has been repeatedly recognized. *U. S. v. Greenhut*, 50 Fed. Rep. 469; *In re Corning*, cited above; *U. S. v. Greenhut*, 51 Fed. Rep. 205; *In re Greene*, 52 Fed. Rep. 104; *In re Terrell*, (*U. S. v. Greenhut*), 51 Fed. Rep. 213.

The mere fact that England and the several states have varied in details, or upon the shades of meaning and the precise scope of technical expressions, does not make it improper for congress to employ them. At the times of enactment of the various federal penal statutes, England and the several states have differed somewhat upon the details of the various offenses. None the less, there was a generally understood crime of "murder," "forgery," "robbery," "piracy," etc., settled in its outlines, and in most of its details, to such a degree that the federal courts could have no difficulty in fixing by its definition the meaning of those words in the federal statutes. *Ball v. U. S.*, cited above; *Moore v. U. S.*, 91 U. S. 270.

Chaplin, for defendants.

CONTRACTUAL CHARACTER OF THE STATUTE SHOWN BY SECTION 6.

Section 6 of the statute in question provides: "Any property owned under any contract, or by any combination, or pursuant to any conspiracy, (and being the subject thereof,) mentioned in section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law." The phrase, "property owned * * * pursuant to any conspiracy," does not refer to property of the character of burglars' tools or counterfeiters' dies; that is, mere vulgar implements of crime. It means commercial property. By the procedure referred to in the section, it is not property to be destroyed, like gaming implements, but property to be sold. Nor is it property merely in the possession of conspirators; that is, property which they may have got by intimidation or robbery or assault. It is property "owned" pursuant to a conspiracy; that is, title has vested pursuant to a conspiracy. The conspiracy in the statute, therefore, is conspiracy aiming to operate by the making or the furtherance of limiting contracts, or contracts of aggregation, or monopolizing contracts.

**NARROWER MEANING OF "RESTRAINT OF TRADE" AND "MONOPOLIZE,"
THE MEANING OF THE STATUTE.**

It has been remarked above that the phrases, "restraint of trade" and "monopolize," have each two significations in the common law,—a broader, including legal and illegal restraint and monopoly, and a narrow and invidious and highly elaborated meaning, including only certain forms of restraint and monopoly obnoxious to public policy. Such broader and narrower uses of a term in the law is very common. According to the case the court will apply the one or the other.

It is really immaterial to the defendants in this case to consider whether the broader or the narrower sense of these terms in the law is to be taken; whether the statute contemplates all restraints and all monopolies,—lawful or unlawful at the common law,—or only such restraint or monopoly as was unlawful at the common law,—since in either sense of the term the restraint or monopoly was contractual, and there is nothing of the sort in the indictment, and since the adoption of the broader meaning would justify, as will shortly be shown, the widespread popular suspicion of unconstitutionality of the act. The defendants could ask nothing better. They propose, however, to present their view of the statute. Their view is that the terms "restraint" and "monopolize" are used in the statute in their narrower and obnoxious meaning, and that the sole operation of the act, therefore, is to import into the federal jurisprudence, civil and criminal, the technical condemnatory principles of the common law (civil and criminal, respectively) in respect of restraint of trade and monopoly, in the narrower and invidious sense of those words, and possibly to extend those principles slightly beyond the realm of "trade" into the outlying zones of "commerce," or, in other words, that the statute operates precisely like most other federal illegalizing or penal statutes, merely to bring within the federal jurisdiction, to the extent of the federal constitution, principles of illegality and criminality already in full operation in the states and in the state courts.

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THE FOREGOING THE ONLY PRACTICAL CONSTRUCTION.

The statute, read literally, punishes all combinations, all contracts, in restraint of interstate or international commerce, without exception; all conspiracies in restraint of such commerce; all monopolizing, all attempts at monopolizing; all combinations and all conspiracies to monopolize any part of such commerce. Its language is sweeping and unqualified. But at the date of the passage of the act there existed, under constitutional protection, vested rights of property and of personal liberty, dependent for their existence upon a complete interstate monopoly and restraint. There were vested patent and copyright rights, not only the rights of patentees and copyright holders, but, as necessarily incident thereto, countless derivative rights of absolute monopoly and restraint. *Gaylor v. Wilder*, 10 How. 477, 494; *Machine Co. v. Morse*, 103 Mass. 73; Gray, J., *Central Transp. Co. v. Pullman's Palace Car Co.*, 189 U. S. 24, 53, 11 Sup. Ct. Rep. 478.

Existing rights of this character, both principal and derivative, although born of federal statute, are none the less rights which congress cannot disturb. *U. S. v. Burns*, 12 Wall. 248; *Cannmeyer v. Newton*, 94 U. S. 225; *James v. Campbell*, 104 U. S. 356. There are also common-law contract rights which it is beyond the power of congress to impair. *Railroad Co. v. Richmond*, 19 Wall. 589.

An attempt to disturb such rights would be unconstitutional; and a statute ought, if possible, to be so construed as to make it constitutional. *Presser v. State of Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Parsons v. Bedford*, 3 Pet. 433; *Brewer v. Blougher*, 14 Pet. 178; *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. Rep. 125; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.

Congress could not, therefore, have intended to use the words of the statute in their broad, literal sense.

But a further exclusion must be made. Even in matters not protected by the constitution, as rights of property or liberty, there are nevertheless many forms of restraint of trade, and many forms of monopoly, which the law recognizes. Under this head come many legal and partial restraints, which, by reason of their legal and partial character, are viewed as not in conflict with the policy of the law, and therefore were, at the time of the passage of the act, legal. For example, traders may lawfully allot themselves exclusive territory, (*Wickens v. Evans*, 4 Car. & P. 359,) or otherwise agree to "equalize" business, (*Collins v. Locke*, L. R. 4 App. Cas. 674,) or to restrain an unreasonable and ruinous competition, (*Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. [1892] App. Cas. 25.)

The test, always, is whether a given restraint is reasonable or not. Assuming that congress had power to change this, and to make all such restraints and monopolies, in so far as they were not constitutionally protected rights of property, illegal and penal, it is perfectly plain that congress meant no such thing. If congress had power to make it illegal and penal for a small trader engaged in local interstate commerce to sell out his little business, and to bind himself not to renew it within 20 miles, congress certainly did not intend to do anything of the sort. Nor did congress intend to interfere at all with most of those restraints and monopolies which in the statutes have always been regarded as right and legal, such, for example, as an agreement of the publisher of an edition de luxe to limit the number of copies; or of an author not to publish a rival text-book; or of a partner, to give his exclusive attention to firm business; or of the owner of a trade secret, looking to the preservation of his secret. These

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and many other similar agreements would be prohibited by this statute if the broad construction were given to the term, "restraint of trade or commerce." It is patent that congress meant nothing of the sort.

[629] It is plain, then, that congress did not intend to cover all restraints and monopolies of interstate trade. Certain restraints and monopolies must be eliminated as being vested rights; and others, as plainly outside the intention of congress. But how is the line of elimination to be drawn? Not arbitrarily, by the courts, but by rules of law, if at all. The only rules of law that can be invoked are the foregoing rules of interpretation, limiting the statute (a) to contractual restraint and monopoly; and, (b) further, to such contractual restraint and monopoly as were already illegal or criminal at the common law.

THIS CONSTRUCTION ADOPTED IN THE LEGISLATION OF MANY STATES.

The act in question is the result of a popular agitation against the development of the modern "trust,"—an agitation which, since 1888, has led to the passage of similar statutes in many states. It is proper to refer to these statutes, as throwing light upon the probable intent of congress in the passage of this act. *Platt v. Railroad Co.*, 99 U. S. 48. An examination of these statutes shows that they are in the main declaratory of the common law. As we have seen, at common law, contracts to limit competition, unduly raise prices, or reduce production, were illegal. These statutes, in terms, simply extend this principle to combinations or conspiracies to make such contracts, the object being to get around the practical difficulty of proving an actual binding contract to do these acts. In view of the secrecy surrounding "trusts," this difficulty had become a great obstacle in the way of justice. These acts simply make illegal any combination organized for the purpose of making such contracts, whether the contracts are completed or not. But in almost all it is expressly stated or implied that it is combinations proceeding by way of contract, not combinations using fraud or violence, that are within the contemplation of these statutes. The conspiracies to commit frauds or crimes were punishable by the common law of such states. The statutes referred to are: Laws Ala. 1890-1891, c. 202; Laws Ill. 1891, p. 206; Laws Iowa, 1890, c. 28; Laws Kan. 1889, c. 257; Laws La. 1890, No. 86; Laws Me. 1889, c. 266; Laws Mich. 1889, c. 225; Laws Minn. 1891, c. 10; Laws Miss. 1890, c. 36; Laws Neb. 1889, c. 69; Laws N. Y. 1892, c. 688, § 7; Laws N. C. 1889, c. 374; Laws S. D. 1890, c. 154; Laws Tenn. 1891, c. 218; Laws Tex. 1889, c. 117.

The act of July 2, 1890, intends, in its concise wording, to accomplish what the above statutes set forth at length, i. e. not to extend the range of contracts already illegal at common law, as in restraint of trade, but to punish combinations aiming to restrain interstate trade by similar contracts.

EXCEPT ON DEFENDANTS' CONSTRUCTION, RANGE OF STATUTE ALMOST UNLIMITED.

It is a general rule of criminal law that one who is engaged in an undertaking unlawful in itself is criminally liable, not only for direct results of his action, but for results naturally flowing therefrom, indirect and un contemplated. If A. joins B. in robbery, and B. uses such violence as to cause death, A. and B. are both liable for murder.

It is another general rule of criminal law that, where persons are guilty of a given offense, they are also guilty of a criminal conspiracy to commit that offense, and that the conspiracy is not merged in the completed offense.

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It follows from these two principles that, if two or more persons join in the commission of an act of an intrinsically unlawful character, they are criminally liable—First, for the act which they intend, and which they commit; second, for a conspiracy to commit that act; third, for indirect results; and, fourth, for a conspiracy to commit natural, although unintended, results. It follows that if two or more persons commit an act of murder, robbery, forgery, shop-breaking, store-burning, champerty, or maintenance, which in fact has a natural, although unintended, result of interference with interstate commerce, they are liable criminally for a conspiracy to interfere with interstate commerce, if the statute broadly covers conspiracy merely to interfere with it.

[630] In most serious offenses, more persons than one are involved, and a large proportion of the serious crime, more or less directly, and often quite closely, affects interstate commerce. If, therefore, "restraint" of interstate trade and commerce in this statute means broadly interference with it, it follows that this statute operates to bring within the federal jurisdiction, in the guise of "conspiracy," a very large proportion of all the serious crime within the states.

Furthermore, where congress takes jurisdiction of a given range of crimes, its jurisdiction is exclusive of that of the states. Where it takes jurisdiction, not strictly of the crimes, but of a federal aspect of the crimes, then acts may be punished twice,—once, as a breach of state law; again, as a breach of federal law. It follows, therefore, from the government's theory of this statute, either that this statute has divested the states of jurisdiction of conspiracy in a great field of the criminal law, relating to murders, etc., or else that ordinary offenders are now liable to be punished twice,—once in the state courts, for the completed act, or for conspiracy to commit it; a second time, under this statute, in the federal courts, for conspiracy to commit it.

These singular results of the government's theory of the statute sufficiently condemn that theory. For a similar course of reasoning by the supreme court upon a question of constitutionality, see *U. S. v. Harris*, 106 U. S. 629, 642, at page 643, 1 Sup. Ct. Rep. 601, at pages 612, 613.

QUESTION OF CONSTITUTIONALITY.

THE DEFENDANTS' FOREGOING CONSTRUCTION ESSENTIAL TO CONSTITUTIONALITY, FROM SEVERAL POINTS OF VIEW.

If a federal statute undertakes to include, in one indiscriminate condemnation, classes of acts which congress can constitutionally punish, and classes of acts which congress cannot constitutionally punish, it is unconstitutional and void as to both classes of acts. *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Harris*, 106 U. S. 629, 642, 1 Sup. Ct. Rep. 601; *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763; *Trade-Mark Cases*, 100 U. S. 82; *Virginia Coupon Cases*, 114 U. S. 270, at page 304, 5 Sup. Ct. Rep. 921, 922; *Leloup v. Port of Mobile*, 127 U. S. 647, 8 Sup. Ct. Rep. 1380. "It would certainly be dangerous," say the supreme court, by Waite, C. J., in *U. S. v. Reese*, 92 U. S. 214, at page 221, "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside, and say who could be rightfully detained, and who should be set at large."

In other words, when congress enters a given field of legislation, over which it has partial power, it must specify in its legislation what part of the field it proposes to occupy, and the part so specified must be wholly within its constitutional reach.

It goes without saying that a statute cannot be saved from the

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operation of this rule by construction, merely by reading into it the words, "this statute to operate so far only as it can constitutionally operate." Such a construction would nullify the rule.

It is true that there may be a federal statute, in part constitutional, in part unconstitutional, of which the constitutional part may stand, while the unconstitutional part falls. It is necessary, however, to the operation of this rule, that the constitutional and the unconstitutional parts be capable of verbal separation, so that each may be read by itself. *Baldwin v. Franks*, 120 U. S. 678, at page 686, 7 Sup. Ct. Rep. 656, 763; *U. S. v. Reese*, 92 U. S. 214, at page 221.

At the date of the passage of this act, there existed numerous vested rights, of lawful restraint and monopoly, constitutionally protected,—among them, patent, copyright, and other monopoly rights, and their derivative rights of lawful restraint, particularly referred to above,—all requiring for their existence an interstate operation. The letter of the statute covers all these rights. If, when properly construed by the rules of statutory interpretation, it still covers them, it is unconstitutional and void. It cannot be construed down, as we have seen, by the easy device of reading into it the words, "this act to operate only so far as it is constitutional." Some other narrowing rule of construction must be invoked to save it. But the only rules which can [631] be invoked are the rules suggested above. The only way, therefore, to make this statute constitutional, is to read its words and phrases as including, in their civil aspect, only acts already unlawful in the states, and, in their criminal aspect, only acts already criminal in the states.

The defendants' counsel have no call to argue that the statute is constitutional. But it is familiar law that, when a statute lacks literal sufficiency merely by being terse and elliptical in expression, the courts may read words into it to narrow or enlarge it. *U. S. v. Kirby*, 7 Wall. 482; *U. S. v. Carl*, 105 U. S. 611, cited above. And a statute ought, of course, if possible, to be so construed as to make it constitutional. *Presser v. State of Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Parsons v. Bedford*, 3 Pet. 433; *U. S. v. Coombs*, 12 Pet. 72; *Brewer v. Blougher*, 14 Pet. 178; *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. Rep. 125; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.

The defendants' foregoing construction is essential to constitutionality from another standpoint.

Throwing out of consideration, for the moment, those lawful monopolies and restraints which are vested, and constitutionally protected, there are, we have seen, numberless lawful restraints of trade, necessarily involving interstate trade and commerce, all of which it is absurd to suppose that congress intended to cut off. To interpret the statute as cutting them off would be to make a new statute. If, among those restraints, not all of which congress intended to cut off, the statute provides no line between those which it does and those which it does not mean to cut off, the statute is unconstitutional for vagueness in undertaking to delegate its legislative powers to the courts. *U. S. v. Cruikshank*, cited above.

From still another point of view the statute, except upon the defendants' foregoing construction of it, is unconstitutional.

Congress cannot punish all acts of interference with interstate commerce, however remote. It is only acts having a proximate relation to a head of constitutional power that congress can take cognizance of. But, as has been stated, the line between federal and state power is in almost every direction an arbitrary line. The question of proximity or remoteness to the federal right is a matter of degree. This is peculiarly true in interstate commerce. The

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line between the federal and the state jurisdiction is an arbitrary and fluctuating line, and the highest courts are constantly divided upon it. The line fixed by the breaking of an original package, although a practical line, is a purely arbitrary line. The constitutional power of congressional legislation in interstate commerce begins with a vanishing line which ends in state commerce. At some point upon that line, in each class of transactions, must be fixed an arbitrary point between interstate and state commerce. Technical "restraint of trade" and "monopoly," in the unfavorable senses of those words, would be within the interstate power of congress; but not all interference with interstate trade or commerce would be within the constitutional power of congress, because it would be at the state end of the vanishing line. If the statute, when properly construed, itself provides no way of fixing the field within which it proposes to act, but undertakes to cover all interference with interstate commerce, then it covers such interference as is too remote for federal action, as well as that which is proximate. It embraces, therefore, with matters which congress can constitutionally deal with, matters which it cannot constitutionally deal with, and therefore follows under the constitutional principle now being discussed. The statute can be interpreted out of vagueness, and too great generality of reach, into constitutionality, only by restricting it to technical, contractual restraint of trade, and technical monopoly, in the unfavorable senses of those words.

It is further essential to the constitutionality of the statute that there be read into it the requirement of a specific intent to invade interstate commerce, as such, and knowledge of its character as interstate commerce, in so far as such knowledge is essential to this conscious intent.

It has been stated above that, by the ordinary rules of the criminal law, persons are criminally liable, not only for direct, but for indirect, and even un contemplated, natural results of their action, and also for conspiracy to commit such indirect and un contemplated results. A mere provision in a statute, or allegation in an indictment, therefore, of a conspiracy to do a certain thing, [632] does not necessarily require or imply actual knowledge, or a conscious, specific intent to do that particular thing. If two men, engaged in a plan of robbery, commit murder, without intending to commit it, and murder is a natural, although un contemplated, result of their plan of robbery, they are guilty, within the meaning of the law, of a conspiracy to commit murder. This statute, therefore, taken literally, covers all cases where persons (at least when engaged in an act *malum in se*) reach, without knowing it, and without contemplating it, a result which amounts to restraint or monopoly of interstate trade or commerce, in whatever sense "restraint" and "monopoly" be taken. But most acts of serious wrongdoing are committed by two or more participants, and a large proportion of the serious crime more or less closely affects interstate commerce. It follows, therefore, that unless there be read into the statute a requirement of a specific intent of discrimination or attack upon federal rights, as such, every instance of robbery, burglary, murder, theft, shop-burning, store-breaking, champerty, or other act *malum in se*, in which there are two or more participants, which has the result, although un contemplated, of restraining or monopolizing interstate commerce, is brought, by the act within the federal jurisdiction, under the guise of conspiracy, since every such joint act implies a conspiracy to commit it, and the conspiracy is not merged in the completed act. Without the requirement of intent and knowledge, therefore, a large proportion of the serious crime of the country may be punished under this

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statute, and possibly is brought by it within the exclusive jurisdiction of the federal courts. Such a range of the statute would be enormously extended by the government's theory of the loose meaning of the phrase, "restraint of trade," and "monopoly." Under that meaning, and under the principles stated above, no limits could be set to the extension of federal criminal jurisprudence effected by this act.

This reasoning forces us to the conclusion, either that the statute is unconstitutional, or that a requirement of knowledge and specific intent to invade federal rights must be read into it. *U. S. v. Harris*, 108 U. S. 629, 1 Sup. Ct. Rep. 601; *U. S. v. Fox*, 94 U. S. 315; *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35; *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617.

In order to save the act in question, we must then read "conspiracies in restraint of trade," etc., as if written, "conspiracies to restrain trade," etc., making an essential element of the crime an intention on the part of the criminal to restrain interstate commerce. It is evident that such was the intention of congress. Section 2 of the act reads, "conspiracy to monopolize," showing that an intention to monopolize is an element of the crime. It is not probable that congress intended to give a wider scope to section 1. The natural expression would be "conspiracy to restrain." The fact that congress has departed from this natural form of words, and has used the term, "conspiracy in restraint of trade," etc., is accounted for by the reasoning of the first part of this brief, namely, that the words, "in restraint of trade," were used because of their well-known technical meaning.

ASIDE FROM QUESTION OF CONSTITUTIONALITY, KNOWLEDGE ESSENTIAL.

A fifth limitation must be put upon the words of the statute. In terms, it covers acts of the character described, whether done with guilty knowledge or not. There are, indeed, petty police offenses in which a knowledge of the facts is not an essential to criminality, and occasionally a statute creating a serious crime has been held to dispense with the requirement of knowledge. Cases of the latter class, however, are few and exceptional, and have been made, as a rule, against a strong dissent, and against the weight of authority upon similar statutes; and invariably, where the requirement of guilty knowledge is held to be dispensed with by a statute, the decision is rested, not upon any principle of criminal law as to dispensing with knowledge, but upon a mere construction of the particular statute, in view of supposed requirements of public policy, and in all cases upon the feasibility, in the particular matter in question, of obtaining all necessary knowledge, and the propriety, therefore, in that particular field of action, of imposing upon one about to act the responsibility of inquiring into the facts, and of acting at his peril. See, in illustration of this, the decisions and the opinions in *Com. v. Mash*, 7 Metc. (Mass.) 472, as compared with *Squire v. State*, 46 Ind. [633] 467, and *Reg. v. Tolson*, 23 Q. B. Div. 168, 16 Cox, Crim. Cas. 629. See, also, *Reg. v. Bishop*, 5 Q. B. Div. 259, 14 Cox, Crim. Cas. 404, and the curious series of recent English cases upon the subject of knowledge of age in abduction. *Reg. v. Olifer*, 10 Cox, Crim. Cas. 402; *Reg. v. Hibbert*, L. R. 1 Cr. Cas. 184, 11 Cox, Crim. Cas. 246; *Reg. v. Mycock*, 12 Cox, Crim. Cas. 28; *Reg. v. Prince*, L. R. 2 Cr. Cas. 154, 13 Cox, Crim. Cas. 138; *Reg. v. Packer*, 16 Cox, Crim. Cas. 57.

The opinions, and the conflicts of opinion, in most of the cases cited above, afford a striking illustration of the subtleties into which one is necessarily drawn in contending for an exceptional dispensation from the general common-law requirement of at least constructive knowl-

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edge of fact. The foregoing cases (which are all exceptional, and avowedly stand upon highly exceptional grounds) only serve to emphasize the fact of the general, and almost universal requirement in the criminal law of knowledge of the facts. Opinions in support of a dispensation with the requirement of knowledge are invariably apologetic in language.

To the effect that the common law (unless possibly in certain forms of nuisance, *Rex v. Medley*, 6 Car. & P. 292; *Reg. v. Stephens*, L. R. 1 Q. B. 702) invariably requires knowledge of the facts as an essential of guilt, and that in statute offenses, whether adoptive of common-law offenses, or creative of new crimes, a requirement of knowledge is to be read into the statute, if not there, see *U. S. v. Carll*, 105 U. S. 611; *Com. v. Filburn*, 119 Mass. 297, (cited with approval in *U. S. v. Carll*, cited above;) *Com. v. Stebbins*, 8 Gray, 492; *Reg. v. Twose*, 14 Cox, Crim. Cas. 327; *Rex v. Hall*, 3 Car. & P. 409; *Levet's Case*, 1 Hale, P. C. 42; *Reg. v. Langford*, Car. & M. 602, 605.

This statute was never intended to punish persons who join together, under an innocent mistake of fact, to enforce what they believe to be a rightful exclusive title in them. If the purchaser of an alleged trade secret believes it to be in fact a secret, and believes that an executor or trustee who sold it to him had a right to sell it, and, if he attempts thereunder to restrain trade by a limiting contract, or to monopolize it, he is not within this statute, even though mistaken in his facts. If he is within it, then an indictment will lie against every patentee who attempts to enforce his patent, if in fact his patent is invalid through priority or some other fact unknown to him; and no patentee can attempt to enforce his rights except at his peril, and at the risk of on infamous punishment in case he turns out to have been ignorant of some prior use, which he could not by the strictest diligence have ascertained, or have supposed to have been made.

It is to be observed that if the knowledge required under the statute now in question is almost necessarily a knowledge of a conclusion of fact, or of mingled law and fact, namely, a knowledge of right and title, or of a lack of right and title, knowledge of this character comes as fully within the general rule as to knowledge as does knowledge of pure and simple fact. In *Com. v. Stebbins*, *Reg. v. Twose*, *Rex v. Hall*, *Levet's Case*, all cited immediately above, the matter of "fact" was a conclusion of law and fact; namely, a question of title.

It is to be further observed that the knowledge required is not knowledge that the defendants are combining and acting in concert, but knowledge of the facts which make their combining or acting in concert penal. Persons acting in concert, but acting innocently, by reason of ignorance of facts, necessarily know that they are acting in concert; but that is not the knowledge which the law requires.

Knowledge, furthermore, under this statute, must comprise knowledge, also, that the trade or commerce proposed to be restrained or monopolized is of a lawful character, and lawful in the hands of the rivals who carry it on, or are to carry it on, and knowledge that the commerce to be interfered with exists, or is to exist.

ON GENERAL PRINCIPLES, WRONGFUL INTENT ESSENTIAL.

One thing more must be read into this statute; namely, intent to fix, control or raise prices to the injury of the public, or in some way to injure or defraud the public.

[634] In the case of the monopoly counts, the requirement would seem to flow from the very meaning of the word "monopolize," for that word, as used in the criminal law, it would seem, involves a wrongful intent, just as "uttering."

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As to the requirement of an intent to injure and defraud the public, and by raising of prices, in all trade offenses, see authorities.

Indeed, the requirement of a guilty intent, or, as it is technically characterized, the "mens rea," in all serious offenses, (not of a highly exceptional character, like *Rea v. Ogden*, 6 Car. & P. 631; *Reynolds v. U. S.*, 98 U. S. 145; *Reg. v. Downes*, 18 Cox, Crim. Cas. 111,) is so nearly universal, whether specified in a statute publishing the offense or not, that it is to be read, as a matter of course, into every statute, unless there are highly exceptional grounds of public policy, in a particular offense, for dispensing with it.

AN INTENDING BENEFICIARY ESSENTIAL.

It is a further essential, under the statute, that the contemplated restraint should be a restraint operating and intended to operate, by the very terms and operation of the restraint, to the benefit of some specific person or persons. The statute punishes, not interference with trade, but a "restraint" of trade, and "restraint of trade," ex definitione, implies a conscious beneficiary. So the crime of monopoly implies a person who is consciously to monopolize. He does not monopolize who exterminates trade, but only he who contractually gathers trade into his own hands, or into the hands of some one in concert with him. There can be no monopolizing without an intentional monopolizee.

SUMMARY OF THE ESSENTIALS OF THE CRIME.

The statute, when properly construed, requires, therefore, in conspiracy under it:

1. That the trade or commerce aimed at be technically interstate commerce.

2. That the persons or things dealt with consciously be dealt with in their federal, and not in their state, aspect.

3. That a contemplated restraint or monopoly be a contractual restraint or monopoly; that is, that the conspiracy must consist in contract, or aim at the making or the enforcement or the furtherance of contracts.

4. That the contemplated restraint or monopoly be a restraint or monopoly, excessive in degree, and unlawful at the common law.

5. That the trade or commerce proposed to be restrained or monopolized be a lawful trade or commerce.

6. That the defendants have (a) knowledge that they or their privies have no patent or other exclusive title or right to the trade or commerce proposed to be restrained or monopolized; (b) knowledge that the trade or commerce proposed to be restrained or monopolized is unlawful, and lawful to those carrying it on in the given instance; (c) knowledge that the commerce in question is interstate commerce.

7. An intent, by unduly raising prices or otherwise, to injure and defraud the public by the contemplated restraint or monopoly, and an intent to restrain interstate commerce, as such.

8. An intending and conscious beneficiary of the contemplated restraint or monopoly.

THE INDICTMENT.

The indictment avers none of the essentials of crime above set forth, and violates every one of the rules of pleading above cited.

1. The alleged contemplated restraint and monopoly was not contractual restraint or monopoly, but a mere rude and vulgar attack upon trade or traders by force, fraud, libel, and slander.

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2. No count sets forth such means of effecting the proposed conspiracy as, if carried out, would be, in any reading of the statute, a restraint or monopoly of interstate trade or commerce. Some of the counts set forth no means at all, or set forth means so vaguely and generally as to be patently [635] bad in this respect. Those counts which undertake to set forth means entirely fail to bring the persons, matters, and things alleged to have been proposed to be dealt with within the definition of "interstate commerce," or its subjects or instruments, or within the federal or interstate aspect of those persons, matters, or things, as distinguished from their state aspect. It does not follow, because one is engaged in interstate commerce, that every attack upon him, or upon any part of his business, is an attack upon interstate commerce. The attack may be upon him in his aspect as a subject of the state, and upon his matters or things only in so far as they are matters of mere state commerce. The indictment assumes that a person engaged in interstate commerce is exclusively engaged in it, and has no other aspect than that of a person engaged in interstate commerce, and that an interference with him, or with any part of his matters or things, is an interference with interstate commerce. Assuming it to be true that interferences with a person, or with matters or things, concerned in local commerce, may, by their necessary connection with certain interstate commerce, be proximate attacks upon interstate commerce, the connection must be established by specific allegations of the indictment. It is not to be inferred. The indictment in this respect is entirely based upon a fallacy upon which the statutes and indictments were based in *U. S. v. Cruikshank*, *U. S. v. Harris*, and *U. S. v. Fox*; namely, the fallacy that the having a federal aspect brings a person and his matters and things within federal protection in all their aspects.

3. It does not appear by any count of the indictment but that the defendants had, or were acting under some one who had, an exclusive right to all trade and commerce, or all interstate trade and commerce, among the states, at least as against the alleged rivals. The defendants may have had a patent covering the cash registers, if any, in which the corporations named as proposed to be attached dealt, if they did deal, or the defendants, or some one privy with them, may have had exclusive patent license for interstate trade in such registers from the various corporations, or from a patentee under whom all claimed title, or the defendants, or some one privy with them, may have bought out a good will or a trade secret from these corporations, or from some one under whom all parties claimed, covering the cash registers, if any, dealt in by said corporations. An indictment in the same terms as this indictment would lie to-day against every patentee in the country, and his agents; and against Emerson's publisher and legatees; against every one who has bought out a good will; against every owner of a trade-mark; in fact, against everybody who owns anything which is the subject of interstate commerce.

4. It is not averred that the commerce, if any, being carried on, or proposed to be carried on, by said corporations, other than the National Company, was a lawful commerce. It may have been in violation of a limited and lawful contract made by them, of restraint, or of division of territory.

5. The interstate commerce (an essential of this crime, and a jurisdictional essential) is alleged only as a conclusion of law. It leaves it for the prosecutor, and not for the court, to decide whether what the prosecutor considers interstate commerce is "interstate commerce," and of the statute's character, or not. But that "is a question of law, to be decided by the court, not the prosecutor." Waite, C. J., *U. S. v. Cruikshank*, cited above.

Chaplin, for defendants.

6. It is in no count alleged, even as a conclusion of law, that the "trade and commerce * * * between and among the several states" alleged to have been aimed at (granting that it was such) was within that limited class of commerce among the several states which alone the statute covers. As has been suggested above, the phrase, "commerce among the several states," as an expression of language, accurately includes a great deal of commerce which is not within the meaning of the phrase, as used in the constitution, and is even less within the still more restricted meaning of the phrase in the statute. The indictment, therefore, runs counter, in this respect, to the rule of pleading that where a statute covers, in terms, a whole class of things, but really intends only a subdivision of the class, the indictment must bring the things which it alleges within the subdivision. The only way to allege interstate commerce in an indictment is the way attempted in the [636] first four counts of an indictment previously found in this district against these defendants, (No. 1209,) viz. by describing in detail the operations supposed to constitute interstate commerce. In that former indictment the pleader was in this particular on the right track, although his pleaded facts were insufficient to make out interstate commerce.

It is not open to the government to contend that the court can judicially know that there was, or was proposed to be, a commerce "among the several states," of the statutory character, in "cash registers." There are articles in which the court may, perhaps, be said to know, as matter of law, that there is at all times such commerce. With "cash registers" it is different. It is very doubtful if the court can be said to know what a "cash register" is. It is certainly difficult to see how the court can know in what sense the term is used in this indictment. Until lately the only meaning which the phrase would suggest is that of an account book for cash entries. Now, in so far as the indictment may be deemed to refer to books of cash entry, the court cannot know that there was at the time in question interstate commerce, or expected or proposed interstate commerce. Blank cash books may be all manufactured and sold within the legal limits of state commerce. The absence of a specific allegation of interstate commerce, therefore, in this meaning of the term "cash register," would be fatal. If the court should take the expression "cash register" in the indictment in a broader sense, as including both account books and also mechanical contrivances, then the indictment, as will be more particularly contended below, under an appropriate head of this brief, would fail, for indefiniteness; for the defendants ought certainly to be apprised whether it is a commerce in machinery, or a commerce in blank books, that they are charged with attacking. If the court should find, upon the face of the indictment, that the "cash registers" referred to in the indictment are the mechanical devices recently introduced into the market, the court will surely apply, as judicial knowledge, not a fraction, but the whole, of its actual knowledge, and will judicially know that these new mechanical devices profess to exist under letters patent; that the different manufacturers claim under patent rights; and that the questions of free or restricted commerce, and of monopoly or no monopoly, are mere questions of patent controversy,—a field of controversy never contemplated by the act of 1890.

If an indictment were to allege, on the part of the Bell Telephone Company and its officers and agents, a conspiracy to restrain the trade and commerce of all other persons, and to monopolize to themselves and their company the trade and commerce in "Bell telephones," would not the court, if it applied to the indictment judicial knowledge that there are such telephones, and that there is com-

Chaplin, for defendants.

merce of the statutory character in them, also apply judicial knowledge of the fact of a lawful monopoly, and an exclusive right to commerce in them, or at least a bona fide claim thereto, not to be tried under a penal statute?

These counts present also the defect (which exists in the other counts) of failing to allege that the commerce was proposed to be continued. It is future transactions which a conspiracy contemplates, and there is no allegation that the commerce of these counts was proposed to be continued from and after the time of the alleged conspiracy. It is fatal to a conspiracy indictment that the object of the conspiracy may have been a myth.

7. No count of the indictment has any averment of knowledge or intent. If the offense necessarily involve knowledge and intent, they must be alleged. An indictment, for example, for conspiracy to commit burglary, must aver a conspiracy, not merely to break and enter a dwelling house in the nighttime, but a conspiracy to break and enter with intent to steal.

8. No count alleges a proposed contractual beneficiary of the contemplated restraint or monopoly. It does not appear that the defendants were in the business, or had any control of the business, or that the National Cash Register company was a party to the conspiracy, or knew of it, or would consent to profit by it. It is not made a defendant, although the statute contemplates corporations. It stands, upon the restraint counts, (counts 1 and 2,) as a mere unconscious, passive, proposed beneficiary, without whose acceptance and co-operation and indorsement there can be no restraint. It [§37] is not alleged that the defendants conspired merely to extinguish the trade of the other corporations. It appears that they combined, if at all, merely to subordinate their trade to that of the National Company; but, in the absence of averments bringing in the National Company as a willing beneficiary, this restraint would be impossible. The averments of the restraint counts are therefore, in this respect, imperfect, absurd, and impossible.

The crime of monopoly implies a conscious monopolizing. A conspiracy of several men, without any knowledge, to drive all the trade in town into my shop, out of love for me, or out of hatred of my rivals, but without my knowledge, and without benefit to the conspirators, is an unlawful conspiracy, under state laws, against the right of my neighbor to live a peaceful life, but it is not a conspiracy to monopolize. It is not averred here that the defendants were in a position to or expected or intended to monopolize into their own personal pockets. There is a faint hint that the intended monopolizer was the National Company, but only a hint.

Acceptance of a benefit may indeed sometimes be presumed by law; but a corporation, any more than an individual, will not be presumed to have accepted itself into a criminal combination.

It is a universal rule, as to those crimes which consist in contract, or combination, or meeting of minds, that there must be, not a mere fictitious appearance of a meeting of minds, but an actual contract, or other meeting of minds, as in civil transactions.

Where the statute speaks of monopolizing "a part of the trade," it must mean the whole of a specific part; while the word "monopolize" is not to be taken in a mathematically exact sense, requiring that a monopolist of flour should have, or intend to have, every teaspoonful of flour in the United States, it does mean a substantial control of a great part of any one given article, or enough to enable him to dictate to the market. The monopoly alleged in counts 5 to 11 and 15 to 18 is merely a monopoly of the business of five corporations named. It does not appear how much business they did, or what

Chaplin, for defendants.

proportion it bore to the whole business of the country in cash registers. It is consistent with the indictment that it was extremely trifling, and that to secure the whole of it would not constitute the offense of monopolizing. Men cannot be indicted for combining to monopolize wheat by a mere averment that they combined to monopolize certain wheat when owned by A. B. Nothing essential is to be assumed, in a criminal case. The names of the rival companies sound well, but the court does not know that they did any appreciable amount of business. The defendants, for all that appears in the indictment, are Mrs. Partingtons attempting to sweep back the Atlantic ocean. It should have been shown that the monopolizing the business of the alleged rival companies would have amounted to a monopolizing of the business in cash registers. Moreover, upon the language of these counts, a monopoly may well have been impossible. There is no averment that the National Cash Register Company was to be interfered with, and, for all that appears, it was not known to the transaction. It may well have been entirely vain for the defendants, if they left the National Company free, to attempt to monopolize the cash register business, even if they monopolized the business of the other companies. Perhaps it had 99 per cent. of the whole business. If so, without its co-operation, monopoly would be impossible.

9. This is a patent suit. Congress never intended, under this statute, to try patent controversies to a jury, in a criminal court. An indictment might undoubtedly be so drawn as properly to bring into a criminal case a plain and simple issue, to the effect that the defendants claimed under a patent, but had no pretense, color, or show of a patent, and held no letters patent, and no license under any letters patent. But here some of the counts aver that the defendants justify under letters patent. There is no averment that the patent claim is not valid, and the question raised by these counts must therefore resolve itself into a question of validity, or the construction, or both, of the letters patent. These counts, therefore, seem calculated to launch the court into a controversy before a jury over a complicated tissue of patent questions, which might occupy a long time in trial. This was never intended. When patents appear in an indictment, as an invalid pretense or justification, it [638] should be alleged that the claim set up under them is a mere sham claim, and only colorable.

10. The indictment is bad for vagueness and uncertainty. In no count does it approximate to the particularity and certainty required by the courts of the United States, and emphasized particularly in *U. S. v. Stimmonds*, 96 U. S. 360; *U. S. v. Cruikshank*, cited above.

In some of the counts the defendants are simply charged with conspiring to restrain or to monopolize certain commerce. Among what states it was, by whom carried on, or proposed to be carried on, or where or how to be restrained or monopolized, these counts do not disclose. The other counts specify the trade or commerce as being carried on by four corporations named, but where, and among what states, these counts do not disclose. Nor does the character of the "cash registers" appear. Were they machines, or tally boards, or books? Tested by the requirement that the defendants must be sufficiently apprised of the details of the charge against them to enable them to prepare for trial, all the contents are bad. In *U. S. v. Stimmonds*, cited above, one was charged having "caused and procured" a still to be used. It was held that he was entitled, under the requirements of criminal pleading, to know whom he was charged with having caused or procured to use the still.

11. It is not averred in any count to what extent trade was carried on. Can the court assume, in a criminal case, an appreciable amount of commerce of the statutory character?

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PUTNAM, Circuit Judge.

I do not think there is any constitutional question in this case upon a view of this statute, or upon the face of the indictment. The right of free commerce granted by the constitution (*Crandall v. Nevada*, 6 Wall. 35, and the *Case of State Freight Tax*, 15 Wall. 232) permits broad legislation; and in no sense is this statute as broad as the Revised Statutes (section 5508) on the principle of construction applied to the latter in *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. See *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617. There may be practical difficulties in applying the statute in such way as to prevent conflicts with state jurisdiction, but these can only arise on the development of the facts at the trial of a particular case, and even then the court will have the guidance of the supreme court in *Re Coy*, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47; and *In re Green*, 134 U. S. 377, 10 Sup. Ct. Rep. 586. Those cases show that there need not necessarily be a conflict of jurisdiction.

This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it.

I regard the rule laid down by the supreme court in *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. Rep. 571, as applying to this case; and I [639] think the case of *U. S. v. Simmonds*, 96 U. S. 860, is easily distinguished. If it is not, the later case will, of course, control. In reference to the suggestion of

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the counsel for the United States, as to cases at common law alleging conspiracy to prevent a man from pursuing his trade, it is sufficient to say that to conspire to prevent a man from pursuing a trade which he is entitled to pursue is in itself illegal. But the case at bar is not at common law, and the proceedings under this statute are peculiar to the statute. I think the rules laid down in *U. S. v. Hess* distinguish this indictment on this point from all the cases and principles of law relied on by the United States.

The allegations of what was done in pursuance of the alleged conspiracy are under this particular statute irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail. I think it was so conceded at the argument. If not, there is no question about the law. The foregoing considerations dispose of counts 1, 2, 3, 6, 7, 8, 11, 12, 13, 15, 16, and 17.

That the means are alleged with "reasonable precision" in the remaining counts, appears from the practical application of the rules of pleading appropriate to this case made in *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. Some of the allegations in each count may be insufficient, but these are only surplusage.

Counts 14 and 18 seem sufficient under the second section of the statute, as will appear from what I have to say hereafter. The remaining counts, 4, 5, 9, and 10, are laid under the first section. Counts 4 and 9 allege an intent to hinder and prevent all persons and corporations, except the corporation controlled by the defendants, from engaging in the trade and commerce described in the indictment, while counts 5 and 10 only allege a purpose to destroy the competition of the four corporations named, without setting out any purpose of engrossing or monopolizing the business as a whole, or any like purpose.

The court does not feel at all embarrassed by the use of the words "trade or commerce." The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade," in its usual sense. Sometimes "commerce" is used to embrace less than "trade," and sometimes "trade" is used to embrace as much as "commerce." They are, in the judgment of the court, in this statute synonymous. The

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court is well aware of the general rule which has been several times (twice certainly) laid down by the supreme court of the United States, that in construing a statute every word must have its effect, and the consequent presumption that the statute does not use two different words for the same purpose; but this rule has its limitations, and it is a constant practice for the legislature to use synonyms. A word is used which it is thought does not perhaps quite convey the idea which the legislature intends, and it takes another word, which perhaps has to some a little different meaning, without intending to more than make strong the purpose of the expression in the statute.

In the legislation of congress analogous to this under consideration there is a marked case of the use of synonyms. Rev. St. § 5438, [640] uses the words "false, fictitious, or fraudulent;" then the words "any false bill, receipt, voucher;" then the words "agreement, combination, or conspiracy;" then the words "charge, possession, custody, or control," mainly synonyms; while section 5440 uses simply the word "conspire." There would be no question that the word "conspire," in section 5440, means all that the three corresponding synonyms, "agreement, combination, or conspiracy," mean in section 5438. Rather as a matter of curiosity than because they particularly impress my mind, I have taken off some other instances. The Massachusetts statute cited in *U. S. v. Britton*, 107 U. S. 670, 2 Sup. Ct. Rep. 512, uses the words "secular labor, business, or employment." The words "false, forged, and counterfeited" are used over and over again in *U. S. v. Howell*, 11 Wall. 436, 437; "peddler and hawker" are in constant use in criminal law; "drinking house or tippling house" is of frequent use in the statutes; so are "goods and chattels." These are all referred to in Bishop on Statutory Crimes as synonymous. There is also the very special case where the criminal statute contained the words "ram, ewe, sheep, and lamb;" and it was held in *Reg. v. McCulley*, 2 Moody, Cr. Cas. 34, that the word "sheep" covered the two preceding words, and they might be rejected as surplusage. Sutherland on Statutory Construction says that words which are meaningless have sometimes been rejected as redundant or surplusage. So in this statute I think

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the words "trade or commerce" mean substantially the same thing. But the use of the word "trade" nevertheless is significant. In my judgment, it was probably used because it was a part of the common-law expression, "in restraint of trade," as has been carefully pointed out by the counsel for the defense. This has become a fixed, well-known, common-law expression; and by the rule of interpretation as given again in *Sutherland on Statutory Construction* (section 253) it has been here used in the sense in which it has been used generally in the law. And these words, "in restraint of trade," lead up directly to what I think is the true construction of this statute on this point.

I think it is useful to analyze the statute. Separating it into parts, we have—First, contract in restraint of trade; second, combination in restraint of trade; and, third, conspiracy in restraint of trade. There can be no question that the second and third parts, as thus put, receive color from the first. Moreover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in *pari materia*, and so has as its basis the engrossing or controlling of the market, or of lines of trade. The sixth section also leads in the same direction, because it provides for the forfeiture of property acquired pursuant to the conspiracy. Undoubtedly the word "conspiracy" in that section has reference to the same subject-matter as in the first. If the intention of the statute was that claimed by the United States, I think the natural phraseology would have been "to injure trade," "to restrain trade."

[641] We are now at the point where the paths separate. Careless or inapt construction of the statute as bearing on this case, while it may seem to create but a small divergence here, will, if followed out logically, extend into very large fields; because, if the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by

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every method of interference by way of violence or intimidation. It is not to be presumed that congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute. Therefore I conclude that there must be alleged in the indictment that there was a purpose to restrain trade as implied in the common-law expression, "contract in restraint of trade," analogous to the word "monopolize" in the second section. I think this is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.

Something has been said in this connection touching the debates in congress. It is apparently settled law that we cannot take the views or purposes expressed in debate as supplying the construction of statutes. In *U. S. v. Union Pac. R. Co.*, 91 U. S. 72-79, and elsewhere, the supreme court has laid down this rule. But this does not at all touch the question whether or not one can gather from the debates in congress, as he can from any other source, the history of the evil which the legislation was intended to remedy. The debates on this point are very instructive; but they fail to point out precisely what incidents or details of the great evil under consideration were to be reached by this legislation.

What I have already said disposes of counts 5 and 10, which do not allege any purpose except to destroy the competition of four corporations named; and they leave for consideration only the counts 4 and 9, which do allege a purpose of engrossing, monopolizing, or grasping the trade in question. Such being the case, acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and intimidation are as much within the mischief of the statute as negotiations, contracts, or purchases. The former are often used to compel the latter. This line of reasoning

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applies to both the first and second sections, and finds a sufficient place for every word in each. I find in all the counts which I allow to stand, allegations of an intent to engross, monopolize, and grasp, and of means clearly unlawful, and adapted to accomplish this intent.

[642] I have examined all the cases which have been cited to me as referring to this statute, and I believe that counsel have cited me every case which has been decided in connection with it; but none of them meet the issue which is raised here. Therefore all the expressions in them supposed to touch this case are to be regarded as mere dicta. The result is that counts 4, 9, 14, and 18 stand, and the others are quashed.

[851] DUEBER WATCH CASE MANUF'G CO. v. E. HOWARD WATCH & CLOCK CO. ET AL.*

(Circuit Court, S. D. New York. May 22, 1893.)

[55 Fed., 851.]

COMBINATIONS IN RESTRAINT OF TRADE—ACTION FOR DAMAGES—PLEADING.—An action to recover damages alleged to have been caused by acts done in violation of the statute prohibiting monopolies and combinations in restraint of trade (26 Stat. 209) cannot be maintained when the complaint fails to show that plaintiff is engaged in interstate commerce, and no such showing is made by an averment that plaintiff is engaged in "manufacturing watch cases throughout all the states of the United States and in foreign countries."^b

SAME—CONSTRUCTION OF STATUTE.—An agreement by a number of manufacturers and dealers in watch cases to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, is not in violation of the statute; and a complaint which, on the last analysis, avers only these facts, without averring the absorption or the intention to absorb or control the entire market, or a large part thereof, states no cause of action.

At Law. Action by the Dueber Watch Case Manufacturing Company against the E. Howard Watch & Clock Com-

*Affirmed Circuit Court of Appeals, Second Circuit (66 Fed., 637). See p. 421.

^b Syllabus copyrighted, 1893, by West Publishing Co.

Statement of the case.

pany and others to recover damages alleged to result from an illegal conspiracy to destroy plaintiff's trade. Defendants demur to the complaint. Demurrer sustained.

Statement by COXE, District Judge:

The complaint alleges that prior to November 16, 1887, the plaintiff was engaged in manufacturing watch cases throughout all the states of the United States and in foreign countries, employing a large number of skilled artisans who were and are able to produce 25,000 watch cases per month. That prior to said date the plaintiff had a ready market for its goods throughout the United States and Canada, and realized a profit of, at least, \$175,000 per annum. That on November 16, 1887, the defendants, who were and are engaged in selling watches and watch cases, mutually agreed, and notified the watch dealers throughout the United States and Canada, including some of the plaintiff's customers, "that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by [§52] this plaintiff." That upon being informed of said agreement a large number of dealers who had previously purchased plaintiff's goods withdrew their patronage and ceased to deal in plaintiff's goods. That the defendants refused to sell their goods to plaintiff's customers, giving as a reason that the said customers dealt in plaintiff's goods and defendants declined to have any business relations with them unless they would agree not to deal in the plaintiff's goods. That prior to November 16, 1887, the defendants agreed among themselves that they would maintain an arbitrary fixed price for their goods, and pursuant thereto they have fixed and maintained an arbitrary price which the public must pay for their goods. That said agreement of November 16, 1887, was for the sole purpose of compelling plaintiff to join with the defendants in their previous agreement to fix and maintain arbitrary prices for watch cases. That all of said acts of the defendants were for the purpose of establishing a monopoly in watch cases, their object being to crush competition and drive the plaintiff from the business, unless he joined the conspiracy. That the defendants by their agreements intended to injure and impoverish the plaintiff and deprive it of all profits and break up its business. That the defendants have used the extended influence acquired by reason of the combination formed between them to prevent persons who naturally would purchase plaintiff's watch cases from dealing with the plaintiff and have threatened said persons that if they bought plaintiff's goods they would sell them no goods and give them no credit. That such conduct and threats effected a complete boycott and resulted in the ostracism of plaintiff from the trade, preventing the lawful and ordinary competition in business which plaintiff had a right to enjoy. That after the passage of the act of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," the plaintiff would have regained its customers and re-established its business had not the defendants since that date ratified, confirmed, renewed and continued in force the said contracts, agreements and combinations and served notice thereof upon all the dealers in plaintiff's goods. That by reason of said renewals and continued threats said dealers have been compelled to refuse to purchase plaintiff's goods to its damage in the sum of \$150,000. Judgment is demanded for three times this sum, pursuant to section 7 of said act.

The defendant above named demurs on the ground that the court

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has no jurisdiction of the defendant or the subject-matter of the action, and, on the further ground, that the complaint does not state facts sufficient to constitute a cause of action. The sections of the act of July 2, 1890, which are drawn in question, so far as it is necessary to quote them, are as follows: "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc. "Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Wilber & Oldham and Robert Sewell, for plaintiff.

Sullivan & Cromwell, W. J. Curtis, and Edward B. Hill, for defendants.

Coxe, District Judge, (after stating the facts as above.)

An examination of the complaint, in the light of the provisions of the act of July 2, 1890, and the decisions construing that act, leads to the conclusion that the complaint, in its present form at least, cannot be sustained. The statute makes it illegal to enter into [853] a contract or conspiracy in restraint of interstate trade and also to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, such trade. There is no allegation in the complaint that the plaintiff is engaged, or has at any time, since the passage of the act, been engaged in interstate trade and commerce. There is an allegation that the plaintiff is engaged in the business of manufacturing watch cases throughout all the states of the United States and in foreign countries. This allegation is probably a mistake of the pleader, but if it were true it would not be a compliance with the requisites of the law. A corporation may have an operating manufactory in every state of the Union and yet not be engaged in interstate commerce. There is no allegation that the defendants are, or that any of them is, or was, engaged in interstate trade, or that the articles made by them are used in such trade, or that the rights of the general public have been invaded, or

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interstate commerce injuriously affected by any of the acts of the defendants as described in the complaint. There is no allegation that the defendants absorbed or intended to absorb the entire trade in watch cases, or that they controlled the market, or any considerable part thereof, or that they were even a majority of the watch manufacturers of the United States, or that the prices fixed by them were more than the goods were worth or in any respect unfair. There is no statement that the goods made by the defendants were made by them exclusively, or that such goods were indispensable to plaintiff's customers; non constat, such goods could have been furnished by the plaintiff or dealers other than the defendants.

What, then, is the accusation? When analyzed it will be found that the illegal acts charged against the defendants are, first, that they agreed to maintain an arbitrary fixed price for their goods; second, that they agreed not to sell their goods to plaintiff's customers; and, third, that they notified plaintiff's customers of their determination. It is only necessary to examine the first and second of these allegations, for it is manifest that if the agreements made by the defendants were lawful it could not be unlawful to notify the world of their existence. Both of the alleged agreements were made before July 2, 1890, the result being that the plaintiff, before the passage of that act, lost its customers. The only acts of the defendants which by any possibility can be construed as a violation of the statute were the ratification and renewal of these agreements after its passage. The complaint alleges that but for such renewal the plaintiff would have regained all its old customers.

The first question then is, does it constitute a violation of the statute for two or more dealers to fix an arbitrary price for their goods? No authority has gone to the extent of holding that such a transaction, in the absence of other facts, is illegal.

The second question is: Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who prefer [854] to purchase the goods of another designated trader in the same business? Many perfectly legitimate rea-

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sons might be suggested for such an agreement. It is not a combination to monopolize; at least there is no statement of facts tending to show that it produced a monopoly in the present case. Indeed, it would seem that it must have had a contrary effect. There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others. The plaintiff's customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer. The contract of 1887 was not one in restraint of trade within any of the definitions or authorities which have been examined, and it is thought that the defendants' acts are not reached by any section of the law in question. The construction contended for by the plaintiff would render each of the defendants liable to an indictment not only, but would make unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A. and B. agree that they will not sell goods to those who buy of C. It would strike at all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition.

It is thought that these views are in conformity with the decisions of the courts construing the act of 1890. *In re Greene*, 52 Fed. Rep. 104; *U. S. v. Nelson*, Id. 646; *U. S. v. Trans-Missouri Freight Ass'n*, 53 Fed. Rep. 440; *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, Id. 213. The demurrer is sustained.

[696] HAGAN ET AL v. BLINDELL ET AL.*

(Circuit Court of Appeals, Fifth Circuit. May 29, 1893.)

[56 Fed., 696.]

COMBINATIONS IN RESTRAINT OF TRADE—EQUITY JURISDICTION.—The jurisdiction of the circuit court to entertain a suit to enjoin a

* Injunction pendente lite granted by Circuit Court, Eastern District of Louisiana (54 Fed., 40). See p. 106.

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combination of persons from interfering with and preventing ship-owners from shipping a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law [697] for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of proof. 54 Fed. Rep. 40, affirmed.*

SAME—INJUNCTION PENDENTE LITE—EVIDENCE—Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination *pendente lite*. 54 Fed. Rep. 40, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill of Blindell Bros. & Co. and others against Charles Hagan and others to enjoin interference with their business as shipowners. From a decree granting an injunction *pendente lite*, (54 Fed. Rep. 40,) defendants appeal. Affirmed.

John D. Grace and *J. Wara Gurley, Jr.*, (*Gurley & Mellon*, on the brief,) for appellants.

F. B. Earhart and *H. P. Dart*, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge.

The only practical question presented by the record is whether the court below had jurisdiction of the case, as made by the bill. We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction of the court is maintainable on general principles of equitable jurisdiction; and a careful examination of the

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case satisfies us that, under all the facts before it, there was no error in the court awarding a preliminary injunction.

The decree is therefore affirmed.

**[85] WORKINGMEN'S AMALGAMATED COUNCIL
OF NEW ORLEANS ET AL. v. UNITED STATES.***

(Circuit Court of Appeals, Fifth Circuit. June 13, 1893.)

[57 Fed., 85.]

CIRCUIT COURT OF APPEALS—REVIEW OF ORDER GRANTING TEMPORARY INJUNCTION.—The circuit court of appeals will not reverse an interlocutory order granting or continuing a temporary injunction unless it is clearly shown that the same was improvidently granted, and is hurtful to the appellant.^b

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Suit by the United States against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. An order was made in the court below granting a temporary injunction, (54 Fed. Rep. 994,) and defendants appeal therefrom. Affirmed.

M. Marks, (*A. H. Leonard* and *Evans & Dunn*, on the brief,) for appellants.

F. B. Earhart, for the United States.

Before McCORMICK, Circuit Judge, and TOULMIN, District Judge.

McCORMICK, Circuit Judge.

November 10, 1892, the district attorney for the eastern district of Louisiana, acting under the direction of the attorney general, in the name of the United States, exhibited in the circuit court for said eastern district of Louisiana a bill for

* Temporary injunction granted by the Circuit Court for Eastern Louisiana (54 Fed., 994). See p. 110.

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injunction under the act of congress to protect trade and commerce against unlawful restraint and monopolies. 26 Stat. 209. The circuit court exercised just caution, and gave respondents ample time to show cause why the preliminary injunction sought should not be granted. Respondents improved the time thus allowed them, and, in all the forms in use in such proceedings, submitted matters of law and fact in opposition to the granting of the temporary injunction. The motion for the temporary injunction continued pending, and the hearing of it was adjourned from time to time until the 27th March, 1893, when the circuit court passed the decree granting the temporary injunction, as prayed for in the bill, as to the appellants, and the respondents appealed.

The appellants assign as error the overruling by the circuit court of each of the grounds of objection urged in that court against the granting of said injunction. These are well summarized, discussed, and disposed of in the very able opinion of the judge of the circuit court who passed the decree now sought to be reversed. The matters of law presented to and considered by him were not well taken by the appellants, respondents below, and the circuit court's ruling to that effect was correct. The bill exhibited is clearly within the statute, and the pleadings of the respondents were not such as [86] to require the refusal of the prayer for a temporary injunction. The volume of assisting and counter affidavits was large, and the conflict of this testimony sharp and emphatic, such as must, in the nature of the case, make variant impressions on the minds of different judges as to the facts shown. The summary of the proof made in the opinion of the judge of the circuit court is fairly supported by the record, and shows that there was proof tending to support the allegations of the bill. The providing by law for an appeal from an interlocutory order granting an injunction certainly clothes the court of appeals with the power and charges it with the duty of reviewing, and in a proper case reversing, the action of the trial court in granting such injunctions; but as to issues of fact, presented as they only can be presented in such cases, the findings of the facts expressed or implied in the action of the trial court should be given due weight, and its action, so far as it rests

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on, or is affected by, the state of facts proved, should not be reversed unless it is made clearly to appear that it was improvident and hurtful to the appellant. In this case the most that can be urged against the order having relation to the state of the proof is that it was unnecessary. It only enjoined the appellants from doing, pending this suit, what the statute forbids and provides may be prevented by injunction. On this appeal from an interlocutory order, which we affirm, we deem it unnecessary to anticipate the further progress and final hearing of this case by an expression of our views as to the full scope and sound construction of this recent and important statute. The order of the circuit court is affirmed.

**[58] UNITED STATES v. TRANS-MISSOURI
FREIGHT ASSOCIATION ET AL.***

(Circuit Court of Appeals, Eighth Circuit. October 2, 1893.)

[58 Fed., 58.]

STATUTES—CONSTRUCTION.—Every statute must be read in the light of the general laws upon the same subject in force at the time of its enactment.^b

SAME—CRIMINAL LAWS—COMMON-LAW OFFENSE ADOPTED BY CONGRESS.—Where congress adopts or creates a common-law offense, and in doing so uses terms which have acquired a well-understood meaning by judicial interpretation, the presumption is that the terms were used in that sense, and courts may properly look to prior decisions interpreting them for the meaning of the terms and the definition of the offense where there is no other definition in the act.

MONOPOLIES—RESTRAINT OF INTERSTATE COMMERCE.—The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) are the contracts, combinations, and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of that act.

* Decision in the Circuit Court, Kansas (53 Fed., 440). See p. 80. Reversed by the Supreme Court (168 U. S., 290). See p. 648.

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SAME.—The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case. Public welfare is first considered, and, if the contract or combination appears to have been made for a just and honest purpose, and the restraint upon trade is not specially injurious to the public, and is not greater than the protection of the legitimate interests of the party in whose favor the restraint is imposed reasonably requires, the contract or combination is not illegal. Shiras, District Judge, dissenting, on the ground that this rule is not applicable to corporations charged with public duties.

[59] **SAME—COMMON-LAW RULE.**—The ground on which certain classes of contracts and combinations in restraint of trade were held illegal at common law was that they were against public policy.

PUBLIC POLICY—HOW DETERMINED.—The public policy of the nation must be determined from its constitution, laws, and judicial decisions.

SAME—INTERSTATE COMMERCE.—The act of February 4, 1887, entitled "An act to regulate commerce," demonstrates the fact that from the date of the passage of that act it has been the public policy of this nation to regulate that part of interstate commerce which consists of transportation, and to so far restrict competition in freight and passenger rates between railroad companies engaged therein as shall be necessary to make such rates open, public, reasonable, uniform, and steady, and to prevent discriminations and undue preferences.

EQUITY—HEARING ON BILL AND ANSWER—EVIDENCE.—When a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer are to be taken as disproved, and the averments of fact in the answer stand admitted.

SAME.—Where the contract is admitted, but the allegations tending to show its sinister purpose, tendency, and effect contained in the bill are denied by the answer, and averments tending to show a just and honest purpose, tendency, and effect are made, the latter averments contained in the answer stand admitted, and the contract will be presumed to have been made for an honest and legitimate purpose, unless the provisions of the agreement clearly show the contrary. In the examination of such a contract, fraud and illegality are not to be presumed.

CONTRACTS—PUBLIC POLICY.—Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract assailed is against public policy.

SAME—RESTRAINT OF TRADE—ANTI-TRUST ACT.—A contract between railroad companies forming a freight association that they will

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establish and maintain such rates, rules, and regulations on freight traffic between competitive points as a committee of their choosing shall recommend as reasonable; that these rates, rules, and regulations shall be public; that there shall be monthly meetings of the association, composed of one representative from each railroad company; that each company shall give five days' notice before some monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to the proposed modification, will submit the question of its proposed action to a vote at that meeting, and, if the proposition is voted down, that it will then give ten days' notice that it will make the modification notwithstanding the vote before it puts the proposed change into effect; that no member will falsely bill any freight, or bill any at a wrong classification; and that any member may withdraw from the association on a notice of thirty days,—appears to be a contract tending to make competition fair and open, and to induce steadiness of rates, and is in accord with the policy of the interstate commerce act. Such agreement cannot be adjudged to be a contract or conspiracy in restraint of trade under the anti-trust act when it is admitted that the rates maintained under the same have been reasonable, and that the tendency has been to diminish, rather than to enhance, rates, and there is no other evidence of its consequences or effect. Shiras, District Judge, dissenting. 53 Fed. Rep. 440, affirmed.

SAME.—No monopoly of trade or attempt to monopolize trade within the meaning of the anti-trust act is proved by such a contract.

[60] **SAME.**—The railroad companies who are parties to such a contract do not thereby substantially disable themselves from the discharge of their public duties

Appeal from the Circuit Court of the United States for the District of Kansas. Affirmed.

Statement by SANBORN, Circuit Judge:

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and 18 railroad companies, under the provisions of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign na-

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tions, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.: Atchison, Topeka & Santa Fe Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"ARTICLE I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red River; thence via that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the International line,—the foregoing to be known as the 'Missouri River line'; thence via said International line to the Pacific coast; thence via the Pacific coast to the International line between the United States and Mexico; thence via said International line to [61] the Gulf of Mexico, and thence via said Gulf to the point of beginning, including business between points on the boundary line as described.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

"EXCEPTIONS.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and

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Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver and Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver and Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental and International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba Railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone, and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"ARTICLE II.

"Section 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and reg- [62] ulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be

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made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction

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or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said com- [63] pany that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"ARTICLE III.

"The duties and power of the chairman shall be as follows:

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising

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under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not; subject to appeal, as provided by section 3 of article 3 of the agreement.

"ARTICLE IV.

"Any willful under-billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"ARTICLE V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at [64] its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

"ARTICLE VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employees, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"ARTICLE VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"ARTICLE VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are de-

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prived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the interstate commerce law of February 4, 1887, entitled "An act to regulate commerce," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and changed by the association thus formed, and that they have complied [65] with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the act of congress of February 4, 1887, entitled, "An act to regulate commerce," and the acts amendatory thereof. They aver that under that act they were required to make all charges reasonable and just; that they were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the interstate commerce commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between

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and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the interstate commerce commission under the act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the interstate commerce act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 53 Fed. Rep. 440.

J. W. Ady, for appellant.

George R. Peck and Joel F. Vaile, (A. L. Williams, N. H. Loomis, R. W. Blair, John M. Thurston, O. M. Spencer, C. A. Mosman, J. D. Strong, and W. F. Guthrie, on the briefs,) for appellees.

Before SANBORN, Circuit Judge, and SHIRAS and THAYER, District Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their [66] main purpose. When acting independently, the spur of self-interest drives each corporation to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is

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withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 congress recognized and adopted this rule of public policy, and by section 5 of "An act to regulate commerce," commonly called the "Interstate Commerce Act," (24 Stat. 379, c. 104; Rev. St. Supp. 529,) prohibited such contracts between common carriers engaged in interstate or international commerce. That act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly called the "Anti-Trust Act," (26 Stat. 209, c. 647; Rev. St. Supp. 762,) congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

The government bases this suit on these provisions of the latter act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; and, third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation. The government does not claim

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that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the interstate commerce act; but it insists that the anti-trust act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the anti-trust act prohibits any contract between competing railroad companies that restricts com- [67] petition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the anti-trust act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that act? and, if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the anti-trust act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this act, but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the supreme court of the United States. *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 558; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658. Two years before its passage congress had enacted the interstate commerce law. They had there provided a code of rules and established a commission for the express purpose

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of regulating that part of interstate and international commerce which relates to transportation. Under these circumstances, three well-settled rules of construction must be applied to ascertain the meaning and scope of the act:

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the act.

(2) Where words have acquired a well-understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where congress creates an offense, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offense, for the definition of the offense if it is not clearly defined in the act adopting or creating it. *U. S. v. Armstrong*, 2 Curt. 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198; *In re Greene*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 1 Black, 459, 469; *McDonald v. Hovey*, 110 U. S. 619, 628, 4 Sup. Ct. Rep. 142.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules to which we have referred and from the title of the act, viz. "An act to protect trade and commerce against unlawful restraints and monopolies," that it was [68] such contracts, and such contracts only, that congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice Burrough in *Richardson v. Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by

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steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not use his art within the time limited. Hull, J., said: "In my opinion, you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and, per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king." Y. B., 2 Hen. V. fol. 5, pl. 26. In 1841, Lord Langdale, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid. *Whittaker v. Howe*, 3 Beav. 383. In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or in any other town where the plaintiffs might have been practicing was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns. *Mallan v. May*, 11 Mees. & W. 652, 667. In 1869, Vice Chancellor James sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it. *Cloth Co. v. Lorsont*, L. R. 9 Eq. 345. In 1889 the supreme court of New York sustained a contract not to manufacture or sell thermometers or storm glasses throughout the United States for 10 years. *Ther-*

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mometer Co. v. Pool, 51 Hun, 157, 163, 4 N. Y. Supp. 861. And in 1891 the supreme court held that a contract of a railroad corporation giving the Pullman Southern Car Company the exclusive right to furnish all drawing room and sleeping cars required by that road during a period of 15 years was not an illegal restraint of trade, and sustained it. *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490. It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject, we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries. *Vidal v. Girard's Ex'rs*, 2 How. 127, 197; *Swann v. Swann*, 21 Fed. Rep. 299.

Turning first, then, to the decisions, we find that it has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if

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suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.

To maintain his proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, the counsel for the government has cited numerous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.*, (Com. Pl. N. Y.) 14 N. Y. Supp. 277. [70] "It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction." *Stewart v. Transportation Co.*, 17 Minn. 372, (Gil. 348.) "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People v. Fisher*, 14 Wend. 9. "Whatever destroys, or even restricts, competition in trade is injurious, if not fatal, to it." *Hooker v. Vandewater*, 4 Denio, 349, 353. A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes to which we have referred, or rest upon some other ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168; *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. Rep. 391; *De Witt Wire-Cloth Co. v.*

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New Jersey Wire-Cloth Co., (Com. Pl. N. Y.) 14 N. Y. Supp. 277; *Salt Co. v. Guthrie*, 35 Ohio St. 666; and *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 484; *Anderson v. Jett*, (Ky.) 12 S. W. Rep. 670; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; *Morrill v. Railroad Co.*, 55 N. H. 531; *Denver & N. O. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled nonmembers to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, and *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were ultra vires the corporations, and their purpose and effect was to monopolize trade, like *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; or cases of questionable authority, like *Com. v. Carlisle*, Brightly, N. P. 36, 39. See, contra, *Snow v. Wheeler*, 113 Mass. 179, 185; *Bowen v. Matheson*, 14 Allen, 499; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; and *Carew v. Rutherford*, 106 Mass. 1, 14. It was natural that in the discussion of contracts of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground,—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade; they rest on the well-settled rules, and come within the well-defined classes, to which we have above referred.

[71] A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competition from illegal contracts in restraint of trade. The

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decision in the leading case upon this subject, (*Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. [7th Amer. Ed.] pt. 2, p. 708,) the case which Chief Justice Fuller says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade, (*Gibbs v. Gas Co.*, 130 U. S. 409, 9 Sup. Ct. Rep. 553,) held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews, Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. Chief Justice Parker, in delivering it, declared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of Chief Justice Parker that contracts in general restraint of trade are illegal—a remark that was not necessary to the determination of the question before him—has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tallis v. Tallis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general post office, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six

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months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544, certain shipowners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea-carrying trade. The latter brought suit for an injunction and damages, but notwithstanding the obvious restriction upon free competition, Lord Coleridge held that the associa- [72] tion was not an unlawful combination in restraint of trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal, (23 Q. B. Div. 598,) and finally affirmed by the house of lords, (App. Cas. 1892, p. 25.) In *Perkins v. Lyman*, 9 Mass. 522, the supreme judicial court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. Rep. 419, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Navigation Co. v. Winsor*, 20 Wall. 64, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the supreme court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for 10 years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public

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by noncompeting companies. *Manchester, etc., R. Co. v. Concord R. Co.* (N. H.) 20 Atl. Rep. 383. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Fowle v. Park*, 131 U. S. 88, 97, 9 Sup. Ct. Rep. 658; *Gibbs v. Gas Co.* 130 U. S. 396, 9 Sup. Ct. Rep. 553; *In re Greene*, 52 Fed. Rep. 104, 118; *Horner v. Graves*, 7 Bing. 735, 743; *Hubbard v. Miller*, 27 Mich. 15, 19; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 363; *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, 354; *Wickens v. Evans*, 3 Younge & J. 318; *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant, Ch. 540; *Mallan v. May*, 11 Mees. & W. 652, 657; *Whittaker v. Howe*, 3 Beav. 383; *Kellogg v. Larkin*, 3 Pin. 123, 150; *Beal v. Chase*, 31 Mich. 490; *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 78 Mo. 389; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 94, 27 N. E. Rep. 1005; *Thermometer Co. v. Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861; *Association v. Walsh*, 2 Daly, 1; *Hodge v. Sloan*, 107 N. Y. 244; 17 N. E. Rep. 335; *Brown v. Rounsavell*, 78 Ill. 589; *Jones v. Clifford's Ex'r*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the anti-trust act was passed the rule had become firmly established in the jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress [73] competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some

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extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs v. Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 625; *Chicago Gaslight & Coke Co. v. Peoples Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; and *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*W. U. Tel. Co. v. American Union Tel. Co.*) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* it was held that an owner of 2,000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* the court held that a gas com-

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pany, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city, could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was [74] held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a * * * contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed. *Navigation Co. v. Winsor*, 20 Wall. 64; *Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. Rep. 490; *Mogul Steamship Co. v. McGregor, Gow & Co.*, 21 Q. B. Div. 544; *Manchester, etc., R. Co. v. Concord R. Co.*, (N. H.) 20 Atl.

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Rep. 383; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389. But even if such an extreme view, as is above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the interstate commerce law, and the action that has been taken thereunder by the government commission which was created to enforce its provisions. The interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the interstate commerce act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation, (Interstate Commerce Act, § 1;) merchants may sell articles of like character and value for as many different prices [75] as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services, (Id. § 2;) merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place, (Id. § 3;) merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul, (Id. § 4;) merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules, (Id. § 6;) merchants

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may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after 10 days' public notice or from decreasing them except after three days' public notice, (Id. § 6;) merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions, (Id. § 12.) These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an act of congress three years before the anti-trust act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the interstate commerce commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare, that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the interstate commerce act invites conferences between railway managers, and that concert of action in certain matters by railway companies is absolutely essential to enable it to accomplish its true purpose.

In the fourth annual report of the commission, at page 19, we find the following statement:

"It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations, for the purpose [76] of agreeing upon classifications and rates, and upon a great

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variety of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces."

And on page 21 of the same report the following:

"In former reports the commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them."

In the second annual report on page 25, when speaking of the unity of railroad interests, the commission uses this language:

"But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon."

And in the same report, on page 23, we find the following:

"A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the first annual report, on page 33, the commission further said:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were

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not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps more than anything else influenced [77] the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we assumed to state the reasons which probably influenced congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the interstate commerce commission, seems to some extent to invite conference and concert of action. It is likewise unnecessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester, etc., R. Co. v. Concord R. Co., supra*. But, without entering into that discussion, it is sufficient to say that, in our judgment, there was no hard and fast rule in force when the anti-trust act was enacted which made very contract between railroad companies void on grounds of public policy if it in any wise checked competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the interstate commerce act, that such contracts were void, if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to

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examine the contract which is alleged to be in violation of the anti-trust act, but before doing so a preliminary observation will not be out of place. The anti-trust act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the interstate commerce act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials [78] of the answer, and the averments of fact in the answer stand admitted. *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.

The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon v. Barnard*, 21 Wall. 430, 437; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, 577, 11 Sup. Ct. Rep. 656.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchell v. Reynolds*, *supra*, the unfortunate remark "that wherever such contract stat indifferenter, and

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for aught appears, may be either good or bad, the law presumes it prima facie to be bad," fall from Chief Justice Parker. This seems to be the reverse of the proposition that every man is presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon, v. Rousillon* 14 Ch. Div. 351, 365; *Stewart v. Transportation Co.*, 17 Minn. 372, 391, (Gil. 348;); *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Metc. (Mass.) 384, 389.

Proceeding, then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulations, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association, in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at [79] the next monthly meeting, and all members shall be bound by the decision of the association "unless then and

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there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two-thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding \$100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4 prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employes and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on 30 days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to

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criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight [80] and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the interstate commerce commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the traffic embraced by the agreement, are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think, that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the interstate commerce act has prohibited such changes

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with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it, even under the operation of the agreement. It is much more probable that under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

[81] It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than 10 days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of

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what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this was one of the main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of the association open; fair, and honorable. All of these are objects that are in line with the true spirit of the interstate commerce act and an intelligent public policy.

The result is that this contract, in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the anti-trust act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that act, evidenced by this contract. So far as can be learned from it, the association has never intended to have, and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses required to pay its officers and employees. It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration. So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such competitor at its

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peril; but these provisions were necessary for the protection of members of the association against the attacks of nonmembers. Without such provisions unreasonably low rates established by the latter would draw away the business [82] of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the 15 days' notice in case of a warfare upon it by a nonmember.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. *In re Greene*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry Co.*, 51 Fed. Rep. 309, 317-321, 2 C. C. A. 174, 230-235; and it is unnecessary to repeat them here. It goes without saying

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that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for 40 days unchanged. Practically the 15 representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not perceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a 30-days notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after 15 days' notice of an intention to make the modifications and changes notwithstanding its action. It is true that there is a provision in the second article of the agreement that regular meetings of the association shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the remark of the counsel for the govern-

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ment that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the anti-trust act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the anti-trust act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the interstate commerce act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the anti-trust act applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed, without costs.

THAYER, District Judge, concurs.

[84] SHIRAS, District Judge, (dissenting.)

I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such nonconcurrence.

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Assuming that the anti-trust act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into by the railway companies forming the Trans-Missouri Freight Association is in contravention of the statute, in that it deprives the public of the benefit of free competition between the associated railway companies, and thereby subjects the commerce of the regions tributary to these lines of railway to the possibility, if not the certainty, of paying increased rates for the transportation of freight over the same.

It is doubtless entirely true that at the present time a more liberal rule prevails than in the earlier days in regard to contracts affecting the business carried on by private citizens or corporations, when the same is essentially of a private nature, and only indirectly affects the public at large. As is pointed out in the opinion of the court, the use of steam and electricity in connection with the mercantile and commercial business of the world has so greatly increased the facilities for commercial intercourse that contracts which a century ago would have been in fact an unreasonable restriction upon trade in its then condition would not now produce the same result, and hence would not fall within the condemnation of the principle which declares unlawful all contracts or combinations which work an unreasonable restriction upon trade and commerce. The principle itself, however, remains in force at the common law even in regard to business enterprises which deal only with matters of private interest, and only incidentally affect the community at large. At an early day a distinction was recognized at the common law between the rules applicable to business pursuits of a purely private nature and those connected with matters directly affecting the community at large; as, for instance, the dealing in commodities forming the necessities of life. Contracts or combinations tending to create a monopoly in the latter articles were condemned as contrary to public policy, when like contracts affecting other kinds of property were held to be valid; and the same principle holds good at the present time. Another distinction which is now firmly established and en-

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forced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combinations in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein. Thus in *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553, the supreme court, speaking by Mr. Chief Justice Fuller, declared that—

“The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual [85] effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, (*Registering Co. v. Sampson*, L. R. 19 Eq. 462,) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. * * * Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld.”

In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, it is said:

“If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest.”

In *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. Rep. 169, it is declared that—

“The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city.”

It is not necessary to extend the citation of authorities

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upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private, corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of eminent domain, a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises [86] carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition therein laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods, or other like articles primarily owe no duty to the

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public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfill public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community, and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argument nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market.

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'The merchant must use the same agency in bringing to his place of business the merchandise in which he deals. Practically the business of the community, whether [87] in connection with articles of prime necessity, like food or fuel, or the other articles which are produced or dealt in by the people at large, becomes of necessity wholly dependent upon the facilities for transportation furnished by the given railway. As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.

Certainly, if it be true, as held in *Gibbs v. Gas Co.*, *supra*, that the supplying of gas for illuminating purposes is a business of a public nature, because it supplies a public necessity, and that it is of such a character that contracts between companies engaged therein, looking to a regulating of competition, cannot be sustained because inimical to the public welfare, then it must also be true that the furnishing facilities for the transportation of the products of the country by means of railways is likewise a public business, and one of such character that contracts or combinations between the corporations engaged therein, intended to limit the effect of free competition upon the rates charged the public, must be held to be prejudicial to the public interests, and therefore to be invalid. It is said in the opinion of the court that—

"We find that it has long been settled that contracts or combinations of producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts or combinations between such producers or dealers to divide their profits in certain fixed proportions and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void."

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Are not railway companies engaged in the transportation of articles of prime necessity to the people? Do they not handle the food products of the country, the fuel, and all the other necessities of life? Do not the rates charged for the transportation of these articles have as much to do with determining the prices paid by the community as the rates charged by those engaged in buying and selling the same upon the open market? If combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and void, why are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is therein admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime neces- [88] sity to the people, tending to monopolize the supply or enhance the price, are contrary to public policy and therefore void; and yet it is maintained that public corporations like railway companies may combine to fix the rates to be charged for the transportation of the like commodities, which of necessity affects the cost to the consumer, as well as the value to the producer, and that contracts thus arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid, unless it be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any contract affecting them affects the public; and clearly public corporations are under a more stringent rule in this particular.

Unlike private parties engaged in private pursuits, which only incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern form of public highways owe primarily a duty to

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the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the people and property of the country, and they are under constant obligation to use their corporate powers in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts or combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the supreme court in *Gibbs v. Gas Co.*, *supra*, are of such a public character that presumably they cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom to contract or combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public [89] interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the in-

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terests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is, in my judgment, clearly contrary to the public welfare, and therefore illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this

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particular the public has relied upon the effect of competition in keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation, in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to the two railway corporations to combine together, and by contract [90] establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free and unrestrained competition between the companies engaged in the transportation business of the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates for the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intended to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation afford-

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ing other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railway without placing the welfare of the public in subjection to the interests or supposed interests of those managing these corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained competition, and not those which are agreed upon by the railway companies in the absence of competition. In the absence of legislation establishing a standard for reasonable rates, and in the absence of rates fixed by free competition, what practicable criterion is there for determining whether a tariff of rates agreed upon by railway companies is or is not reasonable with reference to the public? If it be the law that railway companies may combine together, and by contract agree upon the schedule of rates to be charged, and bind themselves under penalties not to depart from the schedule thus established, and if the individual citizen can obtain no relief against the exaction of rates thus fixed, unless he can in each instance prove to a court and jury that the rate charged is unreasonable, then he is in fact wholly without remedy. The great [91] cost and other evils of litigation of this character would ordinarily deter the private citizen from the effort to maintain his rights by an appeal to the courts.

But if the citizen should assume these burdens, and should contest the rightfulness of the charges complained of, he would, under the view advanced in the majority opinion, be compelled to establish by competent evidence that the rate complained of was unreasonable. By what criterion is the question of the reasonableness of the rate charged to be determined? The article shipped is perhaps a car load or two of live stock or of wheat or other like products. Is the

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citizen to be compelled to attempt to prove what it really costs the railway company to transport these cars? Is the inquiry to embrace an investigation into the cost of the construction of the road, of the equipping the same, and of operating the road on the one hand, and into the total amount and character of the business done by the road, and of the amounts received therefrom, so as to ascertain whether a due relation exists between the income and expenditure? It must be apparent to any one that it would be wholly impracticable to enter upon such an investigation, and, if it was entered upon, the citizen would be at such a disadvantage as to amount to a total denial of justice to him.

If it be said that the reasonableness of the rate charged is to be ascertained by comparison with the rates charged for like services by other railroads, then the rates accepted as the standard of comparison must be such as are the result of free competition, because it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value, and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority a very full and careful analysis is made of the various provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they

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considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

[92] The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it?

I can place no other construction upon this contract than that its main object was to remove the question of rates from the field of competition. In my judgment, it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admits that the defendant companies entered into the contract in question, and the main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent upon its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which was to bind all the contracting companies, and which each company was bound to enforce as against its patrons; thus depriving the public of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be wholly reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved from the effects of free and fair competition in the carrying

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on of the public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted for that afforded the public by the operation of the principle named.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the interstate commerce act, it is therein argued that this act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I must yet be permitted to say that it seems to me that the opinion always [98] loses sight of the distinction existing at the common law between parties following private pursuits and public corporations engaged in public enterprises.

The interstate commerce act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligation to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable, and not exorbitant, compensation for the services rendered by them. The purpose of the interstate commerce act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of railway companies, and to enforce compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the interstate commerce

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act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there are evils of this nature of great magnitude is not to be denied, but the interstate commerce act was not enacted for their eradication.

The primary purpose of that act was to deal with the relations existing between the common carriers and the public, and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the act was, in the language used by the supreme court in *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. Rep. 970, intended "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality." The uniformity and equality of rates sought to be secured by that act are not between the schedules of rates charged by the several companies, but between the charges actually made by each railway company to its patrons. The act does not require the schedule of rates adopted by one company to conform to that of a rival company. What it does demand of each company is that, in dealing with its customers, it shall make no unjust discrimination, but shall, for the like service performed under similar circumstances, charge the same rate to all. The act provides that all charges for the transportation of persons or property from state to state shall be reasonable and just, but no standard for ascertaining whether a given rate is reasonable or not is established by the act.

I fail, therefore, to perceive the force of the argument that the [94] adoption of the interstate commerce act worked a radical change in the relations existing between railway companies and the public, and that one effect thereof was to authorize the former to combine together for the purpose of escaping the effect of competition upon the rates to be charged the public for the services rendered. Before the adoption of that act the community was certainly entitled

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to the protection derived from free competition between the lines of railway engaged in interstate traffic, and there is nothing in that act which deprives the public of this safeguard. That act was intended to secure to the public the enjoyment of the pre-existing right to reasonable rates upon interstate commerce, and to defend the public against the evils resulting from unjust discrimination on behalf of favored parties, localities, or classes of business.

In the opinion of the court are found citations from the reports of the interstate commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be.

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There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the interstate commerce act may have changed in many respects the conduct of the companies in the carrying on of the public business [95] they are engaged in, does not show that it was the intent of congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates.

There are three general methods by which these rates may be established. It may be done by direct legislative enactment, (whereby either fixed rates or a maximum or minimum limit are enacted by the statute or by provisions for the adoption of rates by a commission,) or the rates may be adopted by the independent action of each company, acting under the spur of self-interest, and controlled by the effect of free competition, or the rates may be fixed by means of agreements or combinations between the rival lines of railway, whereby each contracting company is bound to charge the rate thus fixed and agreed upon. Congress has not yet undertaken to establish a standard of rates, either directly or through the action of a commission or the equivalent. Neither, in my judgment, has congress, in enacting the interstate commerce statute and the amendments thereto, conferred upon the railways the right to enter into combinations for the purpose of compelling the members to charge the rates fixed by a committee of the association, in whose deliberations the public have no part, and the avowed purpose of which is to evade the operations of the law of competition, which is as yet the only safeguard upon which the public can rely for the securing of the adoption of reasonable charges upon interstate traffic. I had always supposed that the enactment of the interstate commerce statute was the result of a popular demand, which insisted upon relief being given to the community as against the methods pursued by the railway companies which, in some particulars at least,

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were deemed to be inimical to the public interests. Looking at the causes which brought about the enactment of this statute, and the evils at which it was aimed, it does seem clear that it is wholly wrested from its purpose when it is held that it creates numerous radical and effective changes in the public policy of the nation touching competition between railroad companies engaged in interstate commerce. For the better protection of the rights of the public, and to sweep away the system of discriminations in favor of localities, individuals, or classes of business which had come into vogue, the interstate commerce act was intended to introduce radical changes in railway methods, but it never was intended to curtail the rights of the public and enlarge those of the railway corporations in any substantial particular. The argument of the majority is that, even if it were admitted that under common-law principles all contracts or combinations between public common carriers for the establishment of rates would be held to be contrary to public policy, nevertheless the enactment of the interstate commerce act revolutionized the law in this particular, and authorized railway companies to enter into combinations for the purpose of establishing reasonable restrictions upon the freedom of interstate commerce.

Reading that act in the light of the causes leading to its enact- [96] ment, I cannot find in any of its provisions foundation for the theory that it was intended to confer upon railway companies the right to enter into combinations which, under the principles of the common law, would be illegal, because contrary to public policy. The reasoning of the court is to the effect that "the interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and congress has thereby expressed its conviction that absolutely free competition between carriers is not at the present time conducive to the public welfare, and that other things are more essential to the public good."

I do not quarrel with the proposition that the interstate commerce act imposes important restrictions, (not upon the right, however,) but upon the practice of railway companies

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to do as they please in the matter of making and altering rates. But how does that fact tend to show that the act places restrictions upon the rights of the public? The congress of the United States may place restrictions upon the rights of the railway companies and upon the rights of the public, but the fact that congress may enact laws which are intended to change the methods pursued by the companies in certain particulars does not necessarily restrict the rights of the public. But if it be admitted that by some possible mode of construing the interstate commerce act, and the action of the commission created thereby, it can be held that under its provisions the railway companies became clothed with the right to combine together, and by mutual agreement to create restrictions upon the freedom of interstate commerce, so long as the same are reasonable,—which is the position of the court,—then would it not follow that the right thus created by the interstate commerce act is abrogated by the later enactment found in the anti-trust act, which expressly declares, not that unreasonable contracts, combinations, or restrictions are illegal, but that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal? The statute declares that restraint of interstate commerce, all restraints, every restraint of such trade and commerce brought about by contracts, combinations in the form of trusts or otherwise, or by conspiracy, are illegal. The statutory declaration in effect is that interstate trade and commerce are to remain free from restriction. The declaration of the court is, in effect, that railway companies engaged in interstate commerce may place restrictions upon such commerce; that the right so to do, if not existing under the common law, is conferred upon railway companies by the provisions of the interstate commerce act; that such restrictions cannot be held to be illegal unless it is shown that they are unreasonable, and the presumption is in favor of their reasonableness and consequent legality. I cannot believe that such is the meaning of the interstate commerce and the anti-trust acts. When the latter act was adopted, it had been declared by the supreme court of the United States to be the law that, with regard to the classes of business that

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are of a public nature, and are carried on to meet a public necessity, contracts im- [97] posing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such a public character as of necessity places it in the class declared by the supreme court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the anti-trust act, is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the supreme court? The interstate commerce and anti-trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared, then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefore lawful. If the natural tendency is to check competition in the matter of rates, and to place a restraint, though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that

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railway companies, by combinations between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the exaction of unreasonable rates, but we know that the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations; that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific Railway Companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great [98] majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying trade belonging to the business in which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that 20 or 50 or 500 miles from his place of business there is another railway line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted, may work out its legitimate results, but this is not true of persons engaged in business at noncompetitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact no compet-

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ing line. Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition, and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate noncompetitive points are reasonable or not, and the provisions of the interstate commerce act forbidding a greater charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and noncompetitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect of free competition, how fares it with the citizens residing at the noncompetitive point? By the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway therefore has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has the exclusive control of the rates to be charged; and if the company, by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence [99] of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where

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the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers, whereby it is agreed that they will not bid against one another, but the property shall be bid off at an agreed price for the common benefit of all the contracting parties, are illegal, and a sale thus made is voidable, because all fair competition is prevented by such combination. If the competitors for the transportation business of a given locality agree that there shall be no competition between them on the subject of rates to be charged, does not the same evil result? In the one case it is sought to deprive the owner of his property, without paying to him the fair value that would probably be bid in case competition was not stifled by the agreement between the purchasers. In the other the citizen is subjected to the payment of charges which are not the result of free competition, but are the result of combinations and mutual agreements, entered into for the express purpose of eliminating competition as an element in the determination of the rate to be charged. Thus points and localities which are competitive so long as there is active rivalry between the railway lines seeking the business of the region cease to be such when the rival lines combine and become, in effect, but one upon the subject of the charges to be demanded of the citizens. In such event the citizen becomes subject to a monopoly as complete and absolute as though there was but a single line of railway within his reach. Thus is found in the contract and combination entered into by the defendant companies elements which directly tend to the establishment of a monopoly, complete and absolute, over the transportation traffic in the region traversed by the lines of the defendant companies, due to the undeniable fact that the price charged for the transportation of the property of the community exercises a controlling influence over the question of the success or failure of the various business pursuits and avocations upon which the citizens are dependent for a livelihood, and, moreover, it directly affects and controls the cost to the public of all the necessities of life.

The declaration found in article I of the contract shows upon its face the main purpose of the combination, it being

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therein recited that "the traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof passing between points in the following described territory," etc. Does not this clearly show that the main purpose of the contracting parties is to deal with that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential element [100] in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee may in fact be?

Another feature observable on the face of this contract is that by the exceptions contained in article I the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discriminations for or against particular localities? But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed in-

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tent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of a public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case, then the only safeguard against unreasonable rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public, of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the anti-trust act of July 2, 1890.

[280] UNITED STATES v. PATTERSON ET AL.*

(Circuit Court, D. Massachusetts. June 1, 1893.)

[59 Fed., 280.]

INDICTMENT—DEMURRER—SURPLUSAGE.—Surplusage in an indictment cannot be reached by demurrer of any character; but, if it be assumed that a special demurrer will lie, it must point out the specific language objected to, and not require counsel and the court to search through the indictment for what is claimed as demurrable.^b

SAME—CONSPIRACY TO MONOPOLIZE INTERSTATE COMMERCE—ACT JULY

* Judgment on demurrer (55 Fed., 605). See p. 133.

^b Syllabus copyrighted, 1894, by West Publishing Co.

Opinion of the Court.

2, 1890.—An indictment for conspiracy to monopolize interstate commerce in cash registers need not negative the ownership of patents by defendants, or aver that the commerce proposed to be carried on is a lawful one.

SAME—AVERMENTS.—It is unnecessary to set out in detail the operations supposed to constitute interstate commerce, and in this respect it is sufficient to use the language of the statute.

SAME.—It is unnecessary to allege the existence of a commerce which defendants conspire to monopolize, as the statute does not distinguish between strangling a commerce which has been born, and preventing the birth of a commerce which does not exist.

SAME.—The indictment need not show that the purpose of the conspiracy was to grasp the commerce into the hands of one of the defendants, or that defendants were interested in behalf of the party for whose benefit they conspired, or what were their relations to such party.

At Law. Indictment of John H. Patterson and others for conspiracy to monopolize interstate commerce in cash registers, in violation of the act of July 2, 1890.

Elihu Root and *F. D. Allen*, for the United States.

H. W. Chaplin, for defendants.

PUTNAM, Circuit Judge.

This case was heard on general demurrer, February 28, 1893, during the October term, 1892. 55 Fed. 605. The demurrer was overruled as to counts 4, 9, 14, and 18, and as to all other counts the demurrer was sustained, and the counts quashed, and the defendants were given leave to file special demurrers to the count sustained; and, March 7, 1893, a so-called special [281] demurrer was filed, within the time allowed therefor. This was brought to the attention of the court, and heard during the same term, May 6, 1893.

In the opinion handed down February 28th, the following occurred:

"The allegations of what was done in pursuance of the alleged conspiracy are, under this particular statute, irrelevant."

Again:

"That the means [intending the means by which the market was to be engrossed or monopolized] are alleged with reasonable precision in the remaining counts appears from the practical application of the

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rules of pleading appropriate to this case made in *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35. Some of the allegations in each count may be insufficient, but these are only surplusage."

Notwithstanding this surplusage, there was sufficient in each of the four counts which the court sustained to render them valid; and the surplusage is largely of such a character that it is entirely disconnected from the essential allegations, and may be disregarded at the trial. The pleadings, however, are very voluminous, and there may be difficulty in sifting out the insufficient allegations, especially those touching the "means" referred to, from those which are sufficient, and in determining what is thus to be regarded as surplusage; and, as to this, there may prove to be at the trial differences of opinion between the counsel for the United States, the counsel for defendants, and the court. As the indictment runs against many parties, scattered through several states, at remote distances from each other and from the place of trial, and as its subject-matter is complex, and involves a great number of transactions, it appeared to the court that the trial, at the best, would be burdensome and expensive, both for the United States and the accused, and that on this account it was important to minimize this by settling in advance, if it could be done, what should be held to be surplusage. The court was well aware that what are ordinarily spoken of as special demurrers find their origin in the statutes 27 Eliz. and 4 & 5 Anne, and have been held to be limited to proceedings in the nature of civil suits; but it had in thought that, independently of these special demurrers by statute, there was at common law a special demurrer lying against surplusage, which reached also indictments and criminal informations. Such the court understands to be the statement of the law in Chit. Pl. (7th Eng. Ed.) 253. The court had no intention that the questions which had been fully raised and carefully argued under the general demurrer should again be brought to its attention, and no other intention than that of assisting in simplifying the course of the trial as above explained. The court is, however, now forced to the conclusion that surplusage in indictments cannot be reached by demurrer of any character. Such is positively laid down as the law in Steph. Pl. (3d Amer. Ed.) 365; Heard,

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Crim. Pl. 140, 271; and is also stated by Lord Cranworth in *Mulcahy v. Reg.*, L. R. 3 H. L. 306, 329. If, however, the law is otherwise, and surplusage and irrelevant matter in indictments may be [282] made the subject of a special or limited demurrer, what has been filed by the defendants in this case, under leave granted February 28th, would be sufficient, because it is expressed in general terms, and requires the counsel for the United States and the court to search through the indictment for what is claimed to be demurrable, when, by all the rules of pleading, it ought to set out the specific language objected to, and ask the ruling of the court on that alone. The reason touching this proposition stated in Story, Eq. Pl. § 457, applies everywhere. Clearly is this so in this case, because this so-called special demurrer is expressly to the entire 4th, 9th, 14th, and 18th counts.

It seemed to the court that there must be some way by which, as a matter of right, parties brought in on a complex and voluminous indictment may have settled in advance of the trial what portions of it, if any, are surplusage. It has been frequently said—certainly with reference to civil proceedings—that surplusage might be rejected on summary motion, and the pleadings left to stand as though it had been struck out or never inserted. Gould, Pl. (4th Ed. c. 3, § 170; Chit. Pl. (7th Eng. Ed.) 252; and many other authorities. It has also been understood that in criminal cases it might be disposed of to a certain extent by a *nolle prosequi*, and that this would apply to a separable part of any one count, as well as to the whole of a count, or to an entire indictment. Bish. Crim. Proc. (3d Ed.) § 1391. The general expressions, however, of the opinion in *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, are sufficient to cause this court to proceed no further with these suggestions, unless the subject of them is formally brought to its attention and counsel are duly heard.

On the whole, therefore, the court is compelled to conclude that the permission which it gave to defendants to file a special demurrer was perhaps inadvertent, and certainly has proved ineffectual for the purposes which the court had in mind. The counsel for the defendants, however, have availed themselves of this permission to reargue several of the propo-

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sitions submitted at the hearing on the general demurrer, apparently insisting that they were overlooked by the court, because not noticed in its opinion passed down February 28th; and they also present at least one additional proposition. Many points were raised on demurrer by counsel for the defense, some of them of great importance, and some of a minor character; so that a full exposition of the views of the court touching every question which was presented, would have resulted in an opinion too lengthy to be excusable as coming from a tribunal for whose errors there is ample remedy by appeal. Therefore the court touched in its opinion only the salient features of the case. Under the present circumstances, however, the court feels called on to notice briefly some of the points which have been pressed anew on its consideration.

The claim that the indictment should negative the ownership of patents by the defendants, and also set out that the commerce carried on, or proposed to be carried on, by the National Cash-Register [283] Company, was a lawful one, and perhaps some other matters of that character, proceeds on the hypothesis that its allegations should be certain to every intent,—a rule which applies only to pleas in abatement. All such are matters of defense, not to be anticipated by the prosecutor.

The claims that these counts left it for the prosecutor, and not for the court, to decide whether they state subject-matters of interstate commerce, and also that it is necessary that they should set out in detail the operations supposed to constitute interstate commerce, are not maintainable, because, so far as this feature of the indictment is concerned, it is clearly sufficient, according to numerous decisions of the supreme court, which need not be cited, to use the language of the statute. The suggestion of the court, in the opinion passed down February 28th, that the statute is not one of a class where it is sufficient to declare in the words of the enactment, related to the particular proposition then under consideration.

As to all the propositions touching the existence of commerce in cash registers, or knowledge, or want of allegation of knowledge, on the part of the accused, it is sufficient to

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say that those counts which do allege the existence of such commerce also allege positively knowledge on the part of the defendants; and those which do not allege such existence are sufficient, because neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. On this point, also, in the opinion of the court, it is sufficient to use the language of the statute.

Much of what is said by the defendants about judicial knowledge touching cash registers and patents has no application to common-law proceedings, especially on the criminal side of the court, and the court will not take time to enlarge upon this.

The suggestion that no count alleges an intent to injure or defraud the public by raising the price, or otherwise, relates to indictments of an entirely different character from this at bar, and to conspiracies which are illegal in their essence, without reference to the means adopted to accomplish their purposes.

As to the proposition that the National Cash-Register Company is not alleged to have been a party to the conspiracy, the court went, in this direction, to the extreme limit which the letter of the law would permit. It sustained only those counts which alleged a combination for the purpose of engrossing, monopolizing, or grasping the trade in question, and rejected all those counts which alleged only an intention to destroy certain competitors named. Beyond that the court purposely left its opinion in an indefinite form, because neither the letter of the statute nor the philosophy of pleading conspiracies require that it should appear that the purpose was to engross, monopolize, or grasp into the hands of one of the persons indicted, or that the defendants were interested in behalf of the party for whose benefit they combined to monopolize, engross, or grasp, or, indeed, what their relations were to that party. Even if the statute should finally be held to be limited to combinations to engross, monopolize, or grasp in behalf of some party to the [284] combination, yet there remains the well-known rule of law that it is unnecessary to indict all the persons involved in a conspiracy. Of course, the court would have

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felt less doubt in meeting this objection if it had been alleged that the corporation named was a party to the conspiracy, or if the relations of the accused to it, or some other matter of a kindred character, had been set out. It may be that, when the proofs are developed at the trial, some unforeseen difficulty will arise, which need not now be anticipated; but, on the whole, the court concluded that this objection was not well taken.

In order that the defendants' exceptions may be undoubtedly saved at this term, the general demurrer having been overruled at the last, and that the defendants may be able to show to the appellate court specifically the points taken on demurrer in this court, I conclude to regard the so-called "special demurrer," in connection with the motion filed March 17, 1893, as a petition for a rehearing, and the clerk will enter the following order:

Leave to the defendants to file special demurrer granted February 28, 1893, annulled as inadvertent. Petition of defendants for rehearing on general demurrer granted. Order overruling demurrer as to counts 4, 9, 14, and 18, entered February 28, 1893, annulled. Matters set out in the so-called "special demurrer" are, by leave of court, assigned as additional causes for demurrer under the general demurrer. Counsel for the defendants and for the United States heard anew touching demurrer to counts 4, 9, 14, and 18. Demurrer overruled as to those counts; defendants to answer over, as provided by statute.

[306] UNITED STATES *v.* E. C. KNIGHT CO. ET AL.*

(Circuit Court, E. D. Pennsylvania. January 30, 1894.)

[60 Fed., 306.]

MONOPOLIES—INTERSTATE COMMERCE—SUGAR TRUST.—Act Cong. July 2, 1890, declares "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations" illegal; prohibits any person from attempting to monopolize, or combining or conspiring with any other person to monopolize, any part of the

* Affirmed by the Circuit Court of Appeals, Third Circuit (60 Fed., 934). See p. 258. Affirmed by the Supreme Court (156 U. S., 1). See 379.

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trade or commerce among the several states, or with foreign nations; and invests the circuit courts with jurisdiction to restrain violations of the act. *Held*, that a combination whose object is to enable a single company to monopolize and control the business of refining and selling sugar, by buying up all competing concerns in the United States, is not in violation of this statute; for it constitutes no restriction upon, or monopoly of, commerce between the states, but, at most, only makes it possible for the promoters of the combination to restrict or monopolize such commerce, should they so desire.*

Ellery P. Ingham, United States Attorney, and *Robert Ralston*, Assistant United States Attorney.

John G. Johnson and *R. C. McMurtrie*, for defendants.

BUTLER, District Judge.

The bill charges, in substance, as follows:

E. C. Knight Company, Spreckels' Sugar Refining Company, Franklin Sugar Refining Company and the Delaware Sugar House, were, until on or about March 4, 1892, independently engaged in the manufacture and sale of refined sugar. That they were competitors with the American Sugar Refining Company and with one another; and that they were engaged in trade with the several states and with foreign nations. That the American Sugar Refining Company had, prior to March 4, 1892, obtained the control of all the sugar refineries in the United States, with the exception of the Revere, of Boston, and the refineries of the said four defendants. That the Revere produced annually about 2 per cent., and the said four defendants about 83 per cent. of the total amount of sugar refined in the United States. That in order that the American Sugar Refining Company might obtain complete control of the production and price of refined sugar in the United States, it and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, etc., of the said four defendants by which they attempted to obtain control of all the sugar refineries in this district for the purpose of restraining the trade thereof among the other states. That in pursuance

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of this scheme, on or about March 4, 1892, John E. Searles, Jr., entered into a contract with the defendant Knight Company and individual stockholders named for the purchase of all the stock of the said company, and subsequently delivered to the said defendants in exchange therefor shares of the American Sugar Refining Company. That on or about the same [307] time the said Searles entered into a similar contract with the Spreckels Company and individual stockholders and made a similar contract with the Franklin Company and stockholders and with the Delaware Sugar House and stockholders.

The bill further avers that the American Sugar Refining Company monopolizes the manufacture and sale of refined sugar in the United States and controls the price of sugar. That in making the said contracts the said Searles and the American Sugar Refining Company combined and conspired with the other defendants named to restrain trade and commerce in refined sugar among the several states and foreign nations. That the said contracts were made with intent to enable the said American Sugar Refining Company to monopolize the manufacture and sale of refined sugar among the several states.

The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Company, the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about 33 per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Company and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Company had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Company in Boston, the latter producing about 2 per cent. of the

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amount refined in this country; that in March, 1892, the American Sugar Refining Company entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Company thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Company obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase, the Delaware Sugar House Refinery [308] has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about 10 per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Company; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country.

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Are the defendants' acts, as above shown, prohibited by the statute of 1890, relating to trade and commerce? The provisions involved are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or, by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violation of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The principal questions raised are:

First, do the facts show a contract, combination or conspiracy to restrain trade or commerce, or a monopoly within the legal signification of these terms?

Second, do they show such contract, combination or conspiracy to restrain or monopolize trade or commerce "among the several states or with foreign nations?"

Third, can the relief sought be had in this proceeding?

In the view I entertain the first and third need not be considered. The second must receive a negative answer, and this will dispose of the controversy.

[309] The federal government possesses no jurisdiction over the contracts, business or property of individuals within the states—except to collect revenue for its support. Its powers are derived exclusively from the constitution. It has none other than such as are directly or impliedly conferred by that instrument; and the latter contains no sug-

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gestion of authority to intermeddle with such property rights. By the eighth section of article first, congress is empowered "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." In pursuance of this power the statute of 1890 was enacted; and as the terms employed show, congress was duly careful to keep within the limits of its authority. It is "trade and commerce among the several states and with foreign nations" that the statutes seek to guard against restraint or monopoly.

The contracts and acts of the defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining, in Pennsylvania. They have no reference and bear no relation to commerce between the states or with foreign nations. Granting therefore that a monopoly exists in the ownership of such refineries and business, (with which the laws and courts of the state may deal,) it does not constitute a restriction or monopoly of interstate or international commerce. The latter is untouched, unrestrained and open to all who choose to engage in it. The plaintiff contends, however, that such monopoly in refineries and refining incidentally secures a monopoly of commerce among the states. This position, however, is unsound; the deduction is unwarranted. The alleged control of refining does not of itself secure such commercial monopoly; and at present none exists. The most that can be said is that it tends to such a result; that it might possibly enable the defendants to secure it, should they desire to do so. Whether it would or not depends on their ability with this advantage to control such commerce. They have not tested this ability by attempting to control it, nor shown a disposition to do so. They sell their product, and purchasers may use it in such commerce, or otherwise as they choose. At present the defendants neither have, nor have attempted to secure, such commercial monopoly. As before stated, if they have a monopoly it is in refineries and refining, alone—over which the plaintiff has no jurisdiction. If they should retire from business, close their refineries or devote them to other purposes, the plaintiff could not object. This might and doubtless would indirectly produce some disturbance of or interference with such commerce, but it would not bring the defendants or their

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property within the jurisdiction of congress. Numerous instances might be cited, where contracts, business arrangements and combinations indirectly affect interstate and international commerce without bringing the parties to them or their property within this jurisdiction. It is the stream of commerce flowing across the states, and between them and foreign nations, that congress is authorized to regulate. To prevent direct interference with or disturbance of this flow alone, was the power granted to the federal government. Congress has therefore no authority over articles of merchandise or their owners, or contracts or combinations respecting them, which have not entered into this stream, or having entered, have passed out. It may prohibit and punish all acts which are intended and directed to restrain or otherwise interfere with or disturb such commerce, but it can go no further. To extend its authority to business transactions which have no direct relation to this commerce, but which may incidentally affect it, and to ownership and rights in property not involved in such commerce, because it may possibly become so involved, would be unwarranted by the terms of the constitutional provision, or the statute,—would draw within the jurisdiction of congress most of the business transactions and property of individuals within the states, and would oust the jurisdiction of the states accordingly. A large proportion of the contracts which men enter into, and of the changes which they make in their business and business relations, may and probably do affect such commerce. The diminution or increase of production in agriculture or manufactures, changes from one branch of business or trade to another, all incidentally tend to this result. State legislation prohibiting or restraining the manufacture or sale of certain articles of merchandise, or increasing their cost by exacting license fees, have the same indirect tendency. Such legislative restraint of the manufacture or sale of poisons and alcoholic liquors, and even the increase in the cost or price of property by taxation, could only be sustained by favor of the federal government, in a different view of its power.

The discussion need not be extended; the question is not new. It was fully considered in a case which arose under the

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statute—*In re Greene*, 52 Fed. 104—and the opinion of Jackson, J., (now of the supreme court,) is so clear and satisfactory that I am restrained from quoting what he says only by the desire to be brief. *Veazie v. Moor*, 14 How. 568, 574; *Coe v. Errol*, 116 U. S. 517 [6 Sup. Ct. 475]; *Kidd v. Pearson*, 128 U. S. 1 [9 Sup. Ct. 6],—are to the same effect. The cases of *U. S. v. Greenhut*, 50 Fed. 469, and *In re Corning*, 51 Fed. 213, cited by the plaintiff, are in affirmance of this view, rather than against it. Every element of combination and monopoly shown here was averred in the indictments under consideration there. It was held, however, that no offense against the statute was set out, no interference with interstate or international commerce being charged. The cases did not fail through matter of form or technically, but because the facts averred did not constitute an offense against the United States.

In the cases of *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. 432; *Manufacturing Co. v. Klotz*, 44 Fed. 721; *Dueber Watch Case Manuf'g Co. v. E. Howard Watch & Clock Co.*, 55 Fed. 851, cited by the plaintiff, this question was not considered or raised.

People v. American Sugar Refining Co., 7 Key & Corp. (Cal.) 83, and *People v. North River Sugar Refining Co.*, 16 N. Y. Civ. Proc. 1 & 6, [3 N. Y. Supp. 401]; *Id.*, 54 Hun, 354 [7 N. Y. Supp. 406],—were suits in state courts and involved questions of state law, only.

The bill must be dismissed with costs.

[803] FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. ET AL.

(Circuit Court, E. D. Wisconsin. April 6, 1894.)

[60 Fed. 803.]

This case was not based upon the anti-trust law. It was a petition by Thomas F. Oakes and others, receivers of the property of the Northern Pacific Railroad in a suit brought against that company by the Farmers' Loan and Trust Company stating that their employees contemplated a strike for

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the purpose of preventing a reduction of wages, and praying that they be enjoined therefrom. The only portion of the decision relating to the anti-trust law is found on page 823 of the opinion, and is as follows:

"By act of Congress of July 2, 1890 (26 Stat. c. 647), every combination in restraint of commerce among the several states is declared to be illegal. Under this act it was held by Judge Speer in *Waterhouse v. Comer*, 55 Fed. 149, that a strike, if it ever was effective, can be so no longer; and this view seems to have been held by Judge Villings in the case of *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994. On the other hand, Judge Putman, in *U. S. v. Patterson*, 55 Fed. 605, is inclined to the view that the statute has no relation to labor organizations. I do not find it needful to enter into this field of discussion, or to express an opinion upon the subject, being content to rest my conclusion upon the grounds discussed."

[934] UNITED STATES *v.* E. C. KNIGHT CO. ET AL.*

(Circuit Court of Appeals, Third Circuit. March 26, 1894.)

[60 Fed., 934.]

MONOPOLIES—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.—

The purchase of stock of sugar refineries for the purpose of acquiring control of the business of refining and selling sugar in the United States does not involve monopoly, or restraint of interstate or foreign commerce, within the meaning of the act of July 2, 1890.^b

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill in equity filed by the United States against the E. C. Knight Company, the Spreckels Sugar Refining Company, the Franklin Sugar Refining Company, the Delaware Sugar House, the American Sugar Refining Company, and numerous individuals, to have canceled and declared void certain contracts made by the American Sugar Refining Company with the other defendants, as being the result of a combination or conspiracy to monopolize or restrain interstate and foreign commerce. There was a decree for defendants in the court below, and complainant appeals.

* Bill dismissed by the Circuit Court, Eastern District of Pennsylvania (60 Fed., 306). See p. 250. Decree affirmed by the Supreme Court of the United States (156 U. S., 1). See p. 379.

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Ellery P. Ingham and *Samuel F. Phillips* (*Robert Ralston*, Assistant United States Attorney, on the brief), for the United States.

John G. Johnson (*John E. Parsons* and *Richard C. McMurtrie*, on the brief), for appellees.

Before *ACHESON* and *DALLAS*, Circuit Judges, and *GREEN*, District Judge.

DALLAS, Circuit Judge.

There are three assignments upon this record. The first two aver, in general terms, that the court below erred in dismissing the bill of complaint, and in not granting the relief thereby prayed. The third, alone, specifies the alleged error with particularity, and is in these words: "That the court erred in holding that the facts in this case do not show a contract, combination, or conspiracy to restrain or monopolize trade or com- [935] merce among the several states or with foreign nations." This assignment correctly presents the only question which the case involves.

The bill filed on behalf of the United States is founded wholly upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." Proceedings, such as have been instituted and pursued in this instance, "to prevent and restrain violations of this act," are authorized and directed by its fourth section; and these defendants are charged with violation of its first two sections, which are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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These sections relate, respectively, to restraint of trade and to monopoly, but, as to both, with respect only to "trade or commerce among the several states, or with foreign nations;" and upon the application of this restrictive language of the law to the facts of this case we base our judgment. The learned judge who heard the cause in the circuit court states, in the opinion filed by him, that:

"The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent. of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent. of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained, and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries, and continue the business, if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Co.; that some additional sugar is produced

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in Louisiana, and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence, or more perfect control, over the business of refining and selling sugar in this country."

This statement of the facts is quoted at length merely for the purpose of showing the general nature of the case; the only essential fact—and of that there is no doubt—being that the questioned conduct of the defendants does not, according to our view of the law, concern interstate or foreign commerce. There is no evidence whatever that the defendants have directly monopolized, or have attempted, combined, or conspired to directly monopolize, any part of the trade or commerce among the several states or with foreign nations; or that they have contracted, combined, or conspired in direct restraint of such trade or commerce. The utmost that can be said—and this, for the present purpose, may be assumed—is that they have acquired control of the business of refining and selling sugar in the United States. But does this involve monopoly, or restraint of, foreign or interstate commerce? We are clearly of opinion that it does not. The particular language of the act which is now under consideration was manifestly derived from the clause of the constitution by which congress is empowered to "regulate commerce with foreign nations and among the several states;" and the authorities are distinctly to the effect that this grant of power does not include the regulation of manufactures or productive industries of any sort, even where their product is made, or is intended or contemplated to be made, the subject of commerce beyond the territory of the state where the manufactory or other producing industry is situated or operated. Manufacture and commerce are two distinct and very different things. The latter does not include the former. Buying and selling are elements of commerce, but something more is required to constitute commerce, which, "strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

Enough has been said to indicate the ground upon which our conclusion in this case has been reached, and we do not

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deem it necessary to say more, inasmuch as the subject has very recently been considered and passed upon in the *Case of Greene*, 52 Fed. [937] 104, by Judge Jackson (now one of the justices of the supreme court), in whose opinion the earlier cases are sufficiently referred to.

The decree of the circuit court is affirmed.

[801] UNITED STATES *v.* ELLIOTT ET AL.*

(Circuit Court, E. D. Missouri, E. D. July 6, 1894.)

[62 Fed., 801.]

COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—INJUNCTION.—A combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the states, within the act of July 2, 1890, and acts threatened in pursuance thereof may be restrained by injunction, under section 4 of the act.^b

This was a suit by the United States against M. J. Elliott, George B. Kern, Eugene V. Debs, George W. Howard, L. R. Rogers, Sylvester Kelliher, the American Railway Union, and others, to restrain violations of the act of July 2, 1890 (26 Stat. 209). Complainants moved for a preliminary injunction.

William H. Clopton, United States Attorney.

THAYER, District Judge (orally.)

The unusual character of the bill filed by the government renders it proper that the court should state briefly the reasons that have influenced its action in granting a part of the relief prayed for therein.

The act of congress approved July 2, 1890 (26 Stat. 209), entitled "An act to protect trade and commerce against un-

*Demurrer overruled (64 Fed., 27). See p. 811.

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lawful restraints and monopolies," declares in its first section that:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court."

Ordinarily it is neither lawful nor expedient for a court of equity to award an injunction to prevent the doing of acts that are in themselves crimes. The regular course of judicial procedure requires that persons accused of crime should be prosecuted by information or indictment, and not otherwise. There are, however, well-established exceptions to this rule. When a criminal act is threatened, which is liable to occasion irreparable injury to private persons, or which would give rise to a multitude of suits at law to redress the wrong, if committed, a court of equity may issue an injunction, at the instance of an individual, against parties who threaten to commit the wrong. But the court is not called upon, in this instance, to consider whether the proceeding falls within the ordinary jurisdiction of a court of equity. By the fourth section of the act of July 2, 1890, which is above referred to, congress has declared that:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States in their respective districts under the direction of the attorney general to institute proceedings in equity to prevent and restrain such violations. Such proceedings [802] may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

This section of the act makes the jurisdiction of the court clear over the parties and subject-matter, if the bill now before the court, which has been exhibited with the sanction of the attorney general, shows the existence of a conspiracy among the defendants to restrain trade or commerce

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among the several states, and that acts have already been done or threatened by the several defendants in furtherance of the alleged conspiracy. Congress has seen fit, on grounds of public policy, to authorize the law officers of the government to appeal to the courts of the United States by a bill in equity filed in behalf of the people of the United States, to arrest, by writ of injunction or prohibition, the commission of acts which are designed to obstruct the free flow of commerce between the states, and no one can doubt the power of congress to confer such authority. From the very foundation of the government, it has been accepted as a proposition which admitted of no controversy that the right to regulate commerce among the several states, and to pass laws to protect commerce of that character, pertained to the general government, and that its power in that respect was plenary and paramount.

An examination of the bill which has been exhibited by the United States shows that it charges, in substance, that the various defendants named therein have combined and confederated among themselves to prevent several railroads named in the bill, whose lines radiate from St. Louis, and which are engaged, among other things, in interstate commerce, from conducting their customary business of transporting passengers and freight between points in this state and points in other adjoining states to which their several lines extend. The bill further charges that the several defendants named therein have combined and conspired to induce persons in the employ of said railroad companies to leave the service of their respective companies, and to prevent them from securing other operatives, the object of such conspiracy being to prevent said railway companies from hauling certain cars which are customarily used by them in the transaction of their business as interstate carriers of freight and passengers. The bill also charges the commission of divers and sundry acts by some of the defendants in furtherance of the objects of the aforesaid confederation. Among other things, it is alleged that certain of the defendants have issued orders to persons in the employ of the several railway companies, who act subject to their direction, whereby such

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employés are commanded and required to cease from operating trains of the respective railroad companies in whose service they are employed. It is also alleged that certain of the defendants named in the bill have asserted and threatened that they will tie up and paralyze the operations of each of said railway companies which refuses to [806] accede to certain demands made upon them, and that it is the purpose and object of the defendants so conspiring, and who have made such threats, to so obstruct and cripple said railroad companies as to prevent them from performing their duties as common carriers of freight and passengers between points in the several states to which the lines of such roads extend. It is also charged in the bill, in substance, that it is the purpose and object of the defendants who are engaged in the aforesaid conspiracy to secure to themselves the entire control of interstate commerce between the city of St. Louis and points in other states to which the lines of the several railroad companies mentioned in the bill extend, and to restrain and prevent the persons owning said roads from exercising any independent control thereof in the transaction of interstate business. The court thinks it manifest that the allegations of the bill, which have thus been very imperfectly stated, show the existence of a conspiracy in restraint of trade and commerce among the several states, within the language and the fair intent and meaning of the act of July 2, 1890. A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose, by unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Com. v. Hunt*, 4 Metc. (Mass.) 111. The construction thus given to the act of July 2, 1890, is not a new construction. It has already received the same interpretation in other circuits after full consideration,—particularly by the circuit court of the United States for

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the fifth circuit in the case of *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994, and 6 C. C. A. 258, 57 Fed. 85.

The result is that this court, acting on the ground herein stated, will grant a preliminary injunction, restraining the defendants during the pendency of this suit, and until final hearing, from doing the acts threatened, in pursuance of the alleged conspiracy.

[803] THOMAS *v.* CINCINNATI, N. O. & T. P.
RY. CO.

IN RE PHELAN.

(Circuit Court, S. D. Ohio, W. D. July 13, 1894.)

[62 Fed., 803.]

CONTEMPT—INTERFERENCE WITH RECEIVER—IMPEDING OPERATION OF RAILROAD.—Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court.*

[804] **SAME—INSTIGATING STRIKE—UNLAWFUL COMBINATION.**—Maliciously inciting employes of a receiver, who is operating a railroad under order of the court, to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, is a contempt of the court.

SAME—CONSTITUTIONAL GUARANTY OF RIGHT OF ASSEMBLY AND FREE SPEECH.—Such inciting to carry out an unlawful conspiracy is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious.

CONSPIRACY—COMBINATION TO COMPEL BREACH OF CONTRACT.—A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, in violation of their contracts, and, on their refusal, to inflict pecuniary injury on them by inciting their employes to quit their service, and thus paralyze their business, the

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existence of the contracts being known to the parties so combining, is an unlawful conspiracy.

SAME—BOYCOTT.—A combination by employes of railway companies to injure in his business the owner of cars operated by the companies, by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employes so combining, is a boycott, and an unlawful conspiracy at common law.

SAME—UNLAWFUL PURPOSE.—A combination to incite the employes of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employes more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise.

SAME—RESTRAINT OF INTERSTATE COMMERCE.—Such combination, its purpose being to paralyze the interstate commerce of the country, is an unlawful conspiracy, within the act of July 2, 1890, declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states. *U. S. v. Patterson*, 55 Fed. 605, disapproved.

SAME—OBSTRUCTING MAILS.—Such combination, where the members intend to stop all mail trains as well as other trains, and do delay many, in violation of Rev. St. § 3995, punishing any one willfully and knowingly obstructing or retarding the passage of the mails, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment.

This was a suit by Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company, in which Samuel M. Felton was appointed receiver. The receiver filed a petition for the commitment of F. W. Phelan for contempt, and for an injunction against him.

Harmon, Colston, Goldsmith & Hoadly, for receiver.

Cogan & Shay, for Phelan.

TAFT, Circuit Judge.

Samuel M. Felton was appointed receiver in the above-entitled cause, March 18, 1893, and has ever since been [805]

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engaged, under the order of the court, in operating the railroad of the Cincinnati, New Orleans & Texas Pacific Railway Company, which is more commonly known as the Cincinnati Southern Railroad. On Monday, July 2, 1894, he filed an intervening petition in the original action, in which he stated that during the previous week, and at the time of filing the petition, he was greatly impeded in the operation of the road by a strike of his employes, and of the employes of other railroads in the city of Cincinnati, who were prevented from receiving from him and delivering to him freight carried or to be carried over his road; that said strike was the result of a conspiracy between one F. W. Phelan, now in Cincinnati, and one Eugene V. Debs and others, to tie up the road operated, as the said conspirators well knew, by the petitioner as receiver, and other roads in the western states of the United States, until certain demands or alleged grievance of certain persons not in the employ of the receiver or of any other railroad of the United States were acceded to by persons in no manner connected with the management of any railroad of the United States; that the demand of the employes of one George M. Pullman, or the Pullman Palace Car Company, at Pullman, Ill., for higher wages was refused, whereupon said Debs, Phelan, and others, members of an organization known as the American Railway Union, combined and conspired with each other and with sundry persons, who became members of the organization for the purpose, to compel the Pullman Company to comply with the demands of its employes, and that for the purpose of injuring the Pullman Company, and of thereby forcing from it the concession demanded, Debs, Phelan, and the others named had maliciously conspired and undertaken to prevent the receiver of this court and the owners of other railroads from using Pullman cars in operating their roads, though they are under contract to do so; that in pursuance of said conspiracy Phelan, a resident of Oregon, came to Cincinnati a week before the filing of the petition, and set on foot and incited a strike among the employes of the receiver, and of other railroad companies whose lines run into Cincinnati; that on June 27th, and at other times and places,

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Phelan made inflammatory speeches to such employés, well knowing many of them to be employés of the receiver, in which he urged them all to quit the service of the receiver and the other railroads of the city, and to tie them all up, and to prevent others from taking their places, by persuasion if possible, by clubbing if necessary; that said Phelan was still in the city, directing and continuing the strike, and interfering with the receiver in the operation of the road; that as a result of the conspiracy and strike the receiver had been obliged at great expense to secure and maintain the protection of armed men for his employés; and that all of the foregoing constituted a contempt of this court, and a ground both for committing Phelan and for enjoining him from a continuance of said acts.

Upon the filing of the petition an attachment was issued for Phelan, the contemner, and on the morning of the 3d of July he was arrested, and brought before the court. He was admitted to bail, and at the same time was enjoined by order of the court from, either as an individual or in combination with others, inciting, encouraging, order- [806] ing, or in any other manner causing the employés of the receiver to leave his employ with intent to obstruct the operation of his road, and thereby compel him not to fulfill his contract and carry Pullman cars. On Thursday, July 5th, the motion of the receiver for Phelan's commitment came on to be heard, and a week has since been taken up in the giving of testimony and argument.

I propose first to run over the evidence, as briefly as may be, and determine the facts, and then to consider the law applicable to them.

The American Railway Union is an organization of railway employés, to which are eligible as members all persons in the service of railways below a certain rank. It was organized in June, 1893. On May 11, 1894, at Pullman, Ill., the employés of the Pullman Palace Car Company, engaged in manufacturing railway cars of all kinds, including sleeping cars, left the company's employ because of its refusal to restore wages which had been reduced during the preceding year, and the works were then closed. On June 11, 1894, the

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general convention of the American Railway Union met at Chicago, and decided that the American Railway Union would take measures to compel the Pullman Company to resume business and to re-employ its employes who had left its service on terms to be fixed by arbitration. It does not appear that at this time the Pullman Company's employes were members of the Railway Union, or eligible as such. At the June convention of 1894 there were present representatives from 450 lodges of the union, and the number of members, as estimated at that time, was 250,000. It is said that the local unions had voted for the Pullman boycott before the convention met. The question where the boycott originated is not very material, but it may be said that, as the Pullman strike occurred but a month before the convention, and as it had been deemed necessary by the union to send men all over the country to explain to its members the merits of the Pullman controversy during the boycott, it is obvious that the boycott had its real origin in the union convention at Chicago, where the subject was brought before it, presumably by its board of directors.

The chief governing body of the union is a board of directors, which elects a president, vice president, and secretary, who are the chief executive officers of the union. Eugene V. Debs is, and has been since its organization, the president. Section 6 of the constitution of the union, as adopted in June, 1893, provides that "the board is empowered to provide such rules, issue such orders, and adopt such measures as may be required to carry out the objects of the order, provided that no action shall be taken that conflicts with this constitution." By section 11 of the same instrument the president's powers are thus described:

"It shall be the duty of the president to preside over the meetings of the board and the quadrennial meetings of the general union. He shall at each annual meeting of the board and at each quadrennial meeting of the general union submit a report of the transactions of his office, and make such recommendations as he may deem necessary to the welfare of the order. He shall enforce the laws of the order, sign all charters, circulars, reports, and other documents requiring authentication. He shall decide all questions and appeals, which decisions shall be final, unless otherwise ordered by the board. He may, with the concurrence of the board, deputize any member to per-

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form any required service, issue dispensations not inconsistent with the constitution [807] or regulations of the order, and perform such other duties as his office may impose; and he shall receive such compensation for his services as may be determined at the time of his election."

Phelan, when on the stand, said that these were sections of the old constitution, but that he understood the constitution had been generally changed. He would not say that extensive or material changes had been made, but simply that general changes had been effected. He was in attendance as a delegate only during the last five days of the convention, and this is his explanation for not knowing what the changes were. Phelan's answers on this subject had really no effect to show that the foregoing sections are not still in force, but simply illustrated the evasiveness and verbal quibbling to which the witness was continually willing to resort under examination. It is certainly strange that if he was here, as he says, as a representative of the union, he should not know the changes, if any really material ones had been made in the constitution, under which he was initiating men into the union, and was receiving orders from his superior officers. We shall see, as we progress, that the two sections of the old constitution are still in force, if we can judge at all from the actual authority exercised by the officers of the union during the present boycott.

The plan of the boycott, as shown by the evidence, was this: Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline further to haul them in their trains, and inflict a great pecuniary injury upon the Pullman Company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. As the lodges of the American Railway Union extended from the Allegheny mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan that, in case of a refusal of the rail-

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way companies to join the union in its attack upon the Pullman Company, there should be a paralysis of all railway traffic of every kind throughout that vast territory traversed by lines using Pullman cars. It was to be accomplished, not only by the then members of the union, but also by procuring, through persuasion and appeal, all employes not members either to join the union or to strike without joining, by guarantying that, if they would strike, the union would not allow one of its members to return to work until they also were restored. I shall allude again to the gigantic character of this combination. For my present purpose, it is sufficient to say that on Sunday, June 24th, Phelan came to Cincinnati as the authorized representative of the president and board of directors of the union, to enforce and carry out the contemplated boycott and paralysis of business on all railway lines running into Cincinnati which used Pullman cars until they should cease to use them.

[808] I am aware that Phelan denies that such were his authority and instructions, but, as in the case of his answers in respect to the constitution and its provisions, his denials do not, in view of the overwhelming proof of the circumstances not denied, and his previous admissions not denied, show the fact to be otherwise, but only decrease the reliance which can be placed on any statements made by him in this case. He says that he came here with no direction except to visit the employes of the Pullman Company at a branch factory at Ludlow, to explain to them the merits of the controversy between their employer and their fellows at Chicago, and then, if they struck, to see that they appointed committees who should keep order among them, and look after the sick. At another time he says he was directed to be in Cincinnati during the boycott, but he strenuously denies he was here for the purpose of laying on the boycott or inciting a general strike. He would have the court believe that what occurred was wholly spontaneous, and not through his agency, and that his business was, if there should be such coincidental spontaneity resulting in a strike, to prevent disorder, and to look after the sick. This hardly accords with his first telegram to Debs, his chief officer, dated noon, Tuesday, June 26th, as follows: "Pay no attention to press reports.

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To be effective, was compelled to postpone action until seven, Wednesday morning." On Sunday, June 24th, after Phelan's explanation of the Pullman troubles, the Pullman employes at Ludlow determined to strike, and did so Monday morning at 7 o'clock. Phelan says he did not advise them to strike, but just explained the situation, and then a strike followed. When he had explained, and organized committees among the strikers, after the strike had occurred, through no agency of his, his mission was ended, so far as his instructions went. And yet we find him on Tuesday, June 26th, at 12 o'clock noon, telegraphing his chief that he was obliged to postpone action until Wednesday morning at 7, in order to be effective. Now, what action was this which he hoped to make effective? Can any one doubt for an instant that the action thus foreshadowed was that referred to in Phelan's dispatch to Debs of June 28th following, when he said, "The tie-up is successful"? On Tuesday night, June 26th, there was a meeting of all the switchmen of Cincinnati at Wuebler's Hall. There is no direct evidence how this meeting was called, but the circumstances leave no doubt. Phelan, having brought out the Pullman men, then set to work upon the railway men, and hence the meeting. The telegram of June 26th indicates that Debs expected him to have the meeting and action earlier, but that he was not able to secure an attendance at any earlier meeting sufficiently general to make the action taken effective. Indeed, when the Tuesday night meeting was held, it was found that action must be still further delayed, and a second meeting for Wednesday night was called. At both of these meetings Phelan explained and discussed the Pullman trouble, and announced the Pullman boycott. Now, what was his object? Was it for the purpose of inducing the men whom he addressed, and others not present, whom he urged them to talk to, to demand of the railway companies assistance in boycotting Pullman, and, on refusal, [809] to tie them up, or was it simply for their general information? He repeats upon the stand with much emphasis that he at no time advised any man to strike. What was he doing? His speeches were all directed to that end, and, even if he did not use the word "advise," his conduct was exactly

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the same as if he had. His trifling with the truth, and his attempt to seek shelter again behind verbal quibbles, simply disparages him as a witness, without concealing the facts. Now, what was done at these meetings of Tuesday and Wednesday night after or during Phelan's speeches? A city committee was appointed, consisting of one employé of each of the great railroads entering the city. This committee Phelan continually refers to in his testimony as "my committee," and the term was properly used, for it seems to have spent all its time in his company, and doing his bidding. On this committee was J. Madison, a switchman in the receiver's employ. The first duty of each member of the committee was on Wednesday, June 27th, or on the next day, to notify the yard master of his road that the switchmen and members of the American Railway Union would not handle Pullman cars because a boycott had been laid on them. Madison duly notified McCarty, the yard master of the receiver. The necessary result was that three switchmen on the Cincinnati, Hamilton & Dayton Railroad were discharged or relieved of duty on the afternoon of Thursday, June 28th, and within six hours a general strike of all the switchmen and yard men, including yard engineers and firemen, on all the roads coming into Cincinnati, took place. This was exactly in accordance with the plan which Phelan had outlined to Westcott, a reporter for the Enquirer, on Tuesday or Wednesday before the strike, in a conversation which he does not deny. Beginning with Tuesday night, June 26th, Phelan has made speeches every night since, in which he has continued to explain the Pullman trouble to audiences of railroad men, and has read telegrams from Debs of a character calculated to incite and encourage all railway employés to quit their places, to assist in the Pullman boycott. He says he has made as many as 20 speeches. Two, at least, were made at Ludlow, Ky., a railroad town, the inhabitants of which are, or were, many of them, employés of the receiver. It is in evidence that when the meetings began the number of the receiver's employés who were members of the American Railway Union was 150. And yet Phelan denies that he is in any sense responsible for the strike of the receiver's employés, or of

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those of any other road in town, or for the paralysis of business which followed.

It is marvelous that Phelan can assume such a position in view of the circumstances and his own declarations. Take the evidence of Westcott, the Enquirer reporter, a witness evidently of much experience in acquiring and detailing accurate information, who has no motive to misrepresent Phelan in any way. He was assigned to report the strike, and seems to have found Phelan his best source of information. He made notes of everything at the time, and prepared them afterwards for publication. Phelan has not attempted to deny anything he says. Westcott testifies that Phelan told him before the strike that his main object in coming here was [810] to enforce a boycott against Pullman cars, by tying up every road in Cincinnati for the American Railway Union; that he frequently and constantly repeated the statement that they intended to tie up every road in town, and keep them tied up until they refused to handle Pullman cars; that after the strike on Thursday he said he had most of the American Railway Union men out in Cincinnati, Ludlow, and Covington, and that those who were not out would be out the next morning; that after his arrest he explained that his course had been to tie up the freight trains, and not so much to stop passenger trains, because the money was in the freight business. Schaff, Gibson, and Bender, officers of the Big Four Railroad, testify that Phelan said to them on Thursday afternoon, when they met him for the purpose of seeing whether the "embargo," as Phelan and Debs expressed it, could not be lifted from the Big Four, because it was a Wagner sleeping car line, that he proposed to tie up every line in town, and was in a hurry, because he must go over and tie up the Pan Handle and the C. & O. before sunset; and that, just to show Schaff what he could do, he had called out some more of the Big Four employés. Phelan and those members of the city committee who accompanied him to this meeting deny that this was said, but by their denial show nothing save that their loyalty to their chief is greater than their regard for the sanctity of their oaths. Westcott, the Enquirer reporter, talked with Phelan about this Schaff interview, and Phelan said that, as Schaff tried to "bluff" him, he had

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called out some more of his men, to show that he had no hard feelings; and when Westcott expressed surprise at that way of showing friendliness, Phelan said that was the way the American Railway Union showed its friendliness in a fight. On June 28th, the day of the strike, Debs telegraphed Phelan to let the Big Four alone, if not handling Pullmans, to which Phelan answered: "I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful. Once more will Big Four be let alone." If Phelan was not the chief agent and inciter of the general tie-up in Cincinnati, he has been most unfortunate in the use of the language in his telegrams. What he here said necessarily implied that he had induced all the employes to go out, and was trying to keep them out, and that they threatened to return if the Big Four line was exempted from the tie-up.

What I have said of the credibility of Phelan in reference to his agency in enforcing the boycott and tie-up applies with equal force to nearly all his witnesses, especially to those from his city committee. They would have the court believe that Phelan was merely a peacemaker in this community, with no responsibility for the strike, and no purpose to incite it or continue it. Take Bateman. He was a switchman of the receiver, and on the subcommittee of the road. Debs had been applied to by the president of the stock yards to allow the cattle cars to be unloaded, and Debs—presumably in the exercise of the dispensing power given him by the constitution—had directed Phelan to have this done if no injury to the cause resulted. Pending this matter, Westcott was inquiring into the outcome, and applied to Bateman as a subcommittee for information. Westcott says Bateman told him the stock matter was in Phelan's hands, and that the cattle could not be handled without Phelan's orders; that "whatever Phelan says, goes." Phelan told Westcott substantially the same thing, and a telegram from Phelan to Debs is in evidence, in which he says, "I am having stock unloaded." And yet Bateman denies his conversation with Westcott, and another member of the city committee says that Phelan had nothing to do with it, and only applauded when it was done. Every committee man who

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came upon the stand (and they made the majority of contemner's witnesses) tried to give the impression that they were not acting under Phelan's orders, and so does Phelan, and yet his complete command is so apparent that it cannot escape any one. When Phelan forgot himself he used such expressions as "my committee," "I instructed them to do so and so," and occasionally such telltale words would creep into the evidence of all his witnesses. Another kind of statement indulged in by Phelan and all of the committee was to the effect that these committees were organized solely for the purpose of keeping the peace, and assisting the sick, providing for parades, and hiring halls; but not one word is said about the efforts of the committee to induce men to leave the employ of the various railroads, and yet, if Phelan's injunction was followed, persuasion, explanation, and argument were to be used with all who did not join the cause at once. The committee and subcommittees were 75 in number. Phelan told Westcott at one time that he had to visit railroad yards with his committee; at another time that his committee were out visiting the various yards, to see the day crews. Evidently they were visiting the men who remained still at work, for the purpose of inducing them to quit; and this, though not mentioned by a single witness for the defense, was doubtless one of the chief reasons for their appointment.

With the intention of showing that he has been guilty of no interference with a compliance with the orders of this court, Phelan said upon the stand that he knew the Southern Railroad was operated by a receiver appointed by this court, and was therefore anxious to avoid interference with its operation, and prevented the calling out of the coach cleaners in the Ludlow yards on this account. Moreover, Buelte, of his city committee, testifies that the Cincinnati Southern was especially excepted from the operation of the boycott notice because it was in the hands of the court. And yet Tuesday night, in the preparation for the boycott and strike which was to be put into effect on Thursday following, through the action of committees in respect to which Phelan himself admits he made suggestions, and which were appointed under his supervising eye, a switchman from the receiver's yard

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was made the agent of the American Railway Union and its allies to notify the receiver's yard master of the boycott. The notice was given, and the strike occurred earlier among the receiver's employés than among those on some of the other roads. Phelan told Westcott on Thursday afternoon that the men were all out on the [812] Southern, and yet this was the road he wished to save from the boycott, because it was in the hands of the court. What did he visit Ludlow for on Friday, and address a meeting of railway employés, if he intended to be careful about interfering with the operation of the Southern Railroad by the court? There are no railway employés in Ludlow but those of the receiver. What was Bateman, the committee man, doing in that place in attendance at two other meetings, if the respect of Phelan and his committee for the court's orders was so great? The purpose with reference to the Southern, as with respect to every other road, is so clearly shown by the telegrams between Debs and Phelan, that it could hardly be more certain if Phelan had admitted it.

Debs to Phelan:

"JUNE 27, 1894.

"Indications are that all western lines will be tied up solidly before sunset to-day."

Phelan to Debs:

"JUNE 28, 1894.

"I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful."

Debs to Phelan:

"JUNE 29, 1894.

"About 25 lines now paralyzed. More following. Tremendous blockade."

Debs to Phelan:

"JULY 2, 1894.

"Knock it to them hard as possible. Keep Big Four out, and help get them out at other places."

Phelan to Debs:

"JULY 2, 1894.

"Going out all around. Firemen a unit. Will soon be an avalanche to us. Working outside points."

Debs to Phelan:

"JULY 2, 1894.

"Hold Big Four solid. Going out to-day at every point. Gaining ground rapidly."

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Debs to Phelan :

"JULY 2, 1894.

"Advices from all points show our position strengthened. Baltimore and Ohio, Pan Handle, Big Four, Lake Shore, Erie, Grand Trunk, and Mich. Central are now in fight. Take measures to paralyze all those that enter Cincinnati. Not a wheel turning on Grand Trunk between here and Canadian line."

I have now gone over, more at length than necessary, perhaps, the evidence concerning Phelan's connection with the boycott and strike, his purpose in coming to Cincinnati, and what he did here, and I find the fact to be that he came here deputed by Debs, president of the American Railway Union, and its board of directors, to enforce a boycott against the cars of the Pullman Company by inciting all the employés of the railroads running into Cincinnati to leave their employ, and thereby to tie up every road, and [813] paralyze all traffic of every kind until all of the railroads should consent not to carry Pullman cars in their trains; and that his plan and his actions were directed as much against the Cincinnati Southern road in the hands of the receiver of this court as against every other road in the city; and that he knew, when he inaugurated the boycott on the Southern road and incited the receiver's employés to strike, that the road was in the hands of the receiver, and was being operated under the order of this court.

We come now to consider the question of fact whether Phelan in any of his speeches advised intimidation, threats, or violence in carrying out the boycott. He is charged with having said, on Thursday night, June 28th, at the meeting at West End Turner Hall, that the strike was then declared on; that it was the duty of every A. R. U. man to quit work, to induce and coax other men to go out, and, if this was not successful, to take a club, and knock them out. He is charged with having said, on the same or another occasion during the same week, that the committees should be appointed to persuade men to go out; that, if they would not go, then the committee should get round behind, and kick them out. The meetings at which these remarks were said to have been made were behind closed doors, and no newspaper reporters were permitted to be present. Only A. R. U. men and railroad employés made up the audience. The first charge is sup-

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ported by the evidence of one J. O. Sweeney, a timekeeper of the Big Four Railway, and he is, so far as the evidence shows, a wholly disinterested witness; and by the evidence of one E. W. Dormer, a witness whose credibility I shall consider later. They both say that the remark elicited much applause, and that, shortly before or after, Phelan advised them to be law-abiding citizens. To this charge Phelan makes an explanatory answer as follows:

"I told nobody to take a club, and do anything with anybody. I upon several occasions in this city, have used about that one expression about in the same line with that, the substance of which is about this: I have told the boys—different ones—there was a good deal of demands upon me to go around and see everybody and explain this Pullman trouble. I was worried to death. * * * I said, 'You constitute yourselves a committee of one, each of you, and go to the people,—the community in which you live. Go to the boys,—I mean their acquaintances,—and explain to them this trouble. Talk to them about it. Beseech them to listen, because I want them to get the idea before they would condemn us about it; but do not take a club, and knock them in the head about it.' The peculiarity of the speech elicited applause, but I am afraid it was taken the other way."

With reference to the second charge, it is supported by the evidence of E. W. Dormer, who testifies he heard Phelan say it. An account of the speech in which it was said to have occurred was published in the Cincinnati Enquirer of June 29th, and read to Phelan by counsel for the receiver. It was as follows:

"Mr. Phelan addressed the men familiarly. 'He who is not with us in this struggle is against us, and will be so regarded.' Then he spoke in scathing tones of the Pullmans. 'We want no weak-kneed individuals with us; we want warriors.' Mr. Phelan then launched into an eloquent denunciation of Grand Master Arthur, of the order of locomotive engineers. 'He has not the courage to declare a strike.'"

[814] So far Phelan admitted the truth of the article. The article proceeded:

"When this strike is declared, as it will be before you go home to-night, the members of the American Railway Union in San Francisco, Oregon, Chicago, and all over the great west will stand by you to the bitter end."

As to this he said he did not recollect it, though he would not deny it. "It might have accidentally slipped out," he said. The article, after stating the passage of a resolution not to go back to work till the strike was declared off, which

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resolution Phelan said upon the stand that he never heard of, proceeded:

"Mr. Phelan then resumed: 'We must stand solidly together in this hour of trial, and, if anybody returns to work, or takes the place of strikers, seize them by the back of the neck, and throw them out.'"

Upon this passage the examination was as follows:

"Q. Did you say that?—A. I don't recollect. Q. Will you swear to the court you did not say it?—A. I don't recollect of saying it. Q. Will you swear you did not?—A. I don't recollect of saying it. Q. That is as much as you will say?—A. That is as much as I will say. I will state this, however, if you want any qualification on it. Q. I don't want any qualification.—A. If I did say it, I meant to throw them out of the organization."

This was not a denial of the remark at all, but a statement that it meant something different from what it purported to mean. Phelan said several times in his examination that in a speech remarks slip out that one does not intend. Certainly, if he did not intend personal intimidation by this remark, it was an unfortunate one.

An attack is made on the credibility of Dormer. He was a detective in the employ of Field's Detective Agency of St. Louis, and in the employ of the receiver, ostensibly as a brakeman at first, and afterwards a striker, under the name of Williams. His character has not been attacked otherwise than by showing his assumption of a false appearance and name. There is evidence tending to show a willingness on his part to involve some of his fellow strikers in a trespass on the company's property, but I am bound to say that his accuracy as to everything else that occurred at the meetings which he attended has been borne out by the evidence of Phelan and his witnesses as far as they are willing to recollect. Were the charges as to Phelan's language dependent on Dormer's statement alone, I should not give them sufficient weight to overcome positive denials from Phelan; but the difficulty with Phelan's case is that he does not really and positively deny the statement of Dormer, but seeks to give the language another meaning, which it cannot bear. He contends in respect to each of the charges of inciting violence that his meaning was misunderstood. Had his evidence and that of his committee upon the main issues in this case not been most evasive and wanting in

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sincerity, I should still be inclined to give Phelan's explanations credit, and give him the benefit of a doubt on this point; but his whole case breaks down with the attempt of himself and his followers to conceal and pervert the most apparent fact in the case, namely, that he instigated, engineered, and con- [815] trolled the boycott and strike at Cincinnati from beginning to end. After this his denials and evasions can be given little weight. It is doubtless true that Phelan did tell his men to be law-abiding, that he did tell them to stay out of saloons, and off the company's property, in public, and that he did not wish his followers to subject themselves to the punishment of the law. Westcott testifies to this, and so do Dormer and Sweeney, and this has doubtless prevented many open assaults and trespasses. But I do not doubt that at the same time he encouraged in them a vicious and malicious disposition towards those of their fellows who did not join with them in this boycott, by expressions of the kind testified to by Sweeney and Dormer, and most evasively denied by Phelan, slyly slipped in where they could be given a double meaning if questioned.

The expressions were for the purpose of bringing into operation that secret terrorism which is so effective for discouraging new men from filling the strikers' places, and which is so hard to prove in a court of justice unless it results in open assault. That Phelan openly discouraged conflict with the law is to his credit as a strike organizer, for he wished public sympathy; but that he wished the aid of that secret terrorism, which is quite as unlawful, seems to me to be established. The town of Ludlow has been in such a state that the receiver's employés who live there have been in constant fear. Two engineers have left the town, and moved their families away. The receiver has boarded employés within guarded precincts. It has been shown that storekeepers of Ludlow have refused to sell goods to the receiver's employés because they were boycotted. Threats have been made, and an assault. Insulting and aggressive language has been used to receiver's employés on both sides of the river. Threats are hard to prove. If effective, they not only keep away the employés from service, but the witness from the stand. The receiver has been obliged to keep

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a large force of the United States deputy marshals on both sides of the river and on his engines and trains in order to induce his employes, new and old, to remain in his service. I cannot presume that such protection was invoked by the employes because of groundless fears. The question of fact whether Phelan used expressions in his speeches behind closed doors to the employes of the receiver which were calculated to induce intimidation is not of primary importance in this case, for, as will hereafter be seen, his interference with the operation of the Southern road by the instigation and maintenance of the boycott and strike against the road was the main contempt of this court. The suggestions leading to intimidations would only be aggravations of the contempt; that is all.

Section 725, Rev. St. U. S., provides that:

"The said courts [i. e. courts of the United States] shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment at the discretion of the courts contempt of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehaviour of any person in their presence, or so near thereto as to obstruct the officers of said courts in their official transactions, and the [§16] disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

It has been held by Judge Drummond in *Secor v. Railroad Co.*, 7 Biss. 513, Fed. Cas. No. 12605, that any unlawful interference with the operation of a road in the hands of a receiver is a contempt of the court, because it is a disobedience or resistance by a person to a lawful order of the court. This view has been taken by Judges Brewer and Treat in *U. S. v. Kane*, 23 Fed. 748; and in *Re Doolittle*, Id. 544; and by Judge Pardee in *Re Higgins*, 27 Fed. 443. These authorities show that any willful attempt by any one, with knowledge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals, would give a right of action for damages, is a contempt of the order of the court. The rights of the receiver with reference to his business in conducting the railroad under order of the court are not different in any respect from those of a private rail-

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way corporation. The only difference is in the remedy which the courts will apply to prevent or to punish a violation of them when such a violation prevents or impedes the operation of the road, and is intended to do so.

There is no doubt that Phelan intended to prevent utterly the operation of the Southern road by calling out the receiver's employés. He wished thus to paralyze his business. He did the trust a very substantial injury by stopping all traffic for a time, by making it necessary for the receiver to pay heavy expenses for unusual police protection, and by putting him to much trouble and expense in securing new employés. Now, if the receiver were a private corporation, could he recover damages for the injury thus inflicted on the business of the road? A malicious or unlawful interference with the business of another by inducing his employés to leave his service is an actionable wrong, and subjects the offender to liability for the loss occasioned. In *Walker v. Cronin*, 107 Mass. 555, it was held that a count in a declaration which alleged that a plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendants, well knowing this, did maliciously and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and profits and advantages, and was put to great expense to procure other suitable workmen, and was otherwise injured in his business,—stated a good cause of action. See, also, *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307.

The real question, therefore, is whether the act of Phelan in instigating and inciting the employés of the receiver to leave his employ was without lawful excuse, and therefore malicious. The question is not whether such an act would subject Phelan to punishment [817] by indictment and trial under the criminal laws, but whether the act was unlawful in the sense that he could be made to pay damages for the loss occasioned. Of course, if the act would subject

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him to punishment for an indictable misdemeanor and crime, a fortiori would the act be unlawful; but his act may be a contempt without being a crime.

Now, it may be conceded in the outset that the employés of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of a single employé may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employés by 10 per cent., and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court. His action in giving the advice, or issuing an order based on unsatisfactory terms of employment, would have been entirely lawful. But his coming here, and his advice to the Southern Railway employés, or to the employés of other roads, to quit, had nothing to do with their terms of employment. They were not dissatisfied with their service or their pay. Phelan came to Cincinnati to carry

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out the purpose of a combination of men, and his act in inciting the employés of all Cincinnati roads to quit service was part of that combination. If the combination was unlawful, then every act in pursuance of it was unlawful, and his instigation of the strike would be an unlawful wrong done by him to every railway company in the city, for which they can recover damages, and for which, so far as his acts affected the Southern Railway, he is in contempt of this court.

Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy [818] at common law? If it was, then injury inflicted would be without legal justification, and malicious. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and, on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injury on the railway companies by inciting their employés to quit their services, and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pullman. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlaw-

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ful, and is a conspiracy. *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240.

But the combination was unlawful without respect to the contract feature. It was a boycott. The employés of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employés had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected, an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England.

In *Moore v. Bricklayers' Union*, 23 Wkly. Cin. Law Bull. 48, a union which embraces 95 per cent. of the bricklayers of 10670°—S. Doc. 111, 62-1, vol 1—19

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Cincinnati got into a controversy with Parker, a boss bricklayer, concerning apprentices and other matters. The union boycotted Parker, and notified all material men that any one selling him material would themselves be boycotted. Moores & Co. continued to sell Parker lime. Thereupon the union notified all of plaintiffs' customers and probable customers that none of its members would work Moores & Co.'s materials, and seriously damaged the business of Moores & Co. There was no violence, actual or threatened, in the case. Moores & Co. sued the Bricklayers' Union and some of its prominent members for the damages caused by the boycott. This case was tried before a jury in the superior court of Cincinnati, and resulted in a verdict for the plaintiffs of \$2,500. The motion for a new trial was reserved to the general term, where the case was fully considered, and the conclusion reached that the verdict must stand, because the combination to injure Moores & Co. was an unlawful conspiracy. The case was then carried by writ of error to the supreme court of Ohio, and the judgment of the superior court was affirmed, without opinion. By the common law of Ohio, therefore, boycotts are illegal conspiracies. I quote from the opinion of the superior court in that case two passages, which seem to me to state the ground for holding boycotts illegal:

"We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer, or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights the loss which is suffered is *damnum absque injuria*. So it may reduce the employer's profits that his workmen will not work at former prices, and that he is obliged to pay on a higher scale of wages. The loss which he sustains, if it can be called such, arises merely from the exercise of the workman's lawful right to work for such wages as he chooses, and to get as high rate as he can. It is caused by the workman, but it gives no right of action. Again, if a workman is called upon to work with the material of a certain dealer, and it is of such a character as either to make his labor greater than that sold by another, or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection, and refuse to work it. The loss of the material man in his sales caused by such action of the workman is not a legal injury, and not the subject of action. And so it may be said that in these respects

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what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss. But on this common ground of common rights, where every one is lawfully struggling for the [820] mastery, and where losses suffered must be borne, there are losses willfully caused to one by another in the exercise of what otherwise would be a lawful right, from simple motives of malice.

* * * * *

"The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract to labor except on such terms. * * * If the workmen of an employer refuse to work for him except on better terms, at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are bona fide exercising their lawful rights to dispose of their labor for the purpose of lawful gain. But the dealings between Parker Bros. and their material men, or between such material men and their customers, had not the remotest natural connection either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which, in its exercise, brought them into legitimate conflict with the rights of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and, upon failure of this, to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the bona fide exercise of trade, is without just cause, and is, therefore, malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired will not, as we think we have shown, make any legal justification for defendants' acts."

And so here there was no natural relation between Pullman and the railway employes, and their attempt to injure the companies because they would not injure him is without cause, and malicious, and is unlawful, even though the injury is inflicted merely by quitting employment.

Temperton v. Russell (1893) 1 Q. B. 715, was a case quite like the case just cited. There a firm of builders refused to obey certain rules laid down by three trades unions connected with the building trade at Hull. Thereupon a joint committee of the unions boycotted the building firm; that is, they attempted to prevent it from procuring any materials by notifying material men not to furnish them, on pain of being themselves boycotted. The plaintiff, a material man, refused to comply with its demand, and the unions then demanded of his material men not to furnish

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him any material, with the threat that, if they did so, their workmen would quit. The result of this was that contracts for supplies to the plaintiff were broken, and others who, but for the threats, would have made contracts, were deterred from doing so. It was held that the boycott was an unlawful conspiracy, and that the joint committee of the unions who were sued were liable in damages for a malicious interference with the plaintiff's business. There was no violence or threatened violence in this case. The case was decided by the court of appeal of England, consisting of Lord Ester, master of rolls, and Lopes and A. L. Smith, lord justices.

In *Carew v. Rutherford*, 106 Mass. 1, a contracting stone mason, contrary to the rules of the union, sent some of his material out of the state to be dressed, and his men, members of the union, re- [821] fused to work for him any longer unless he paid a fine to the union, and did not return until he paid the fine. This was held to be illegal conspiracy for the purpose of extortion and mischief, and the employer was given a judgment for the recovery of the fine and damages.

Boycotts have been declared illegal conspiracies in *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; in *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Steamship Co. v. McKenna*, 30 Fed. 48; *Casey v. Typographical Union*, 45 Fed. 135; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 738; and in other cases.

But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are the arteries on the human body, and yet Debs and Phelan and their associates proposed, by inciting the employés of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can

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lawfully exercise no control, to pay more wages to his employés. The merits of the controversy between Pullman and his employés have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise.

More than this, the combination is in the teeth of the act of July 2, 1890, which provides that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

That such a combination as the one under discussion is within the statute just quoted has been decided by Judge Billings of Louisiana in *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994. His view has been followed by the circuit judges of this circuit within the past 10 days, by Judges Woods, Allen, and Grosscup of the seventh circuit, and by Judge Woolson of the eighth circuit. A different view has been taken by Judge Putnam in *U. S. v. Patterson*, 55 Fed. 605, but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned [822] judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore their combination was for an unlawful purpose, and is a conspiracy, within the statute cited.

It could also be shown, if it were necessary, that this combination was an unlawful conspiracy because its members intended to stop all mail trains as well as other trains, and did delay and retard many, in violation of section 3995, Rev. St. U. S., which imposes a penalty on any one willfully and knowingly obstructing or retarding the passage of the mail.

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It would be no defense, under that statute, that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment.

Something has been said about the right of assembly and free speech secured by the constitution of Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand.

But it is unnecessary to consider the question further. It is very clear that Phelan came here to carry out an illegal conspiracy, in the course of which, and in pursuance of which, he attempted, and partially succeeded in tying up the Southern Railroad, operated by a receiver under an order of this court, as he well knew. His purpose in calling out the employés of the Southern Railroad was unlawful by the law of Ohio and the laws of the United States. He intended to prevent entirely its operation. He partially succeeded, and he subjected the receiver to great expense in reducing the loss occasioned by his acts.

It follows that the contemnor is guilty as charged, and it only remains to impose the sentence of the court. This is in the discretion of the court, to be exercised on any information in reference to the convicted person which the court believes to be reliable. The court would be much more disposed to leniency in this case if the contemnor, after his arrest, had shown the slightest regard for the order of the court which the receiver was attempting to comply with in the operation of the road. Even if he did not fully realize the position in which he had put himself with respect to the order of the court to the receiver to operate the Southern Railroad, his arrest, and the service of the intervening peti-

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tion, together with the restraining order, should have quickened his conscience and his perceptions of his duty in this regard. It was his duty, therefore, to cease all his operations with reference to the strike in this city which could in any way affect the operation of the Southern Railway, whether by inciting employ  s to leave the receiver or by preventing [823] his employment of others. What did he do? Instead of ceasing to incite the receiver's employ  s to leave his employ in pursuance of his unlawful conspiracy, there has been no change whatever in his course from that pursued by him before his arrest. By speeches every night since the arrest he has aggravated his contempt. On the night of July 4th, it is in evidence, the contemnor said, in a speech to railroad employ  s of the city, referring to this trial:

"I don't care if I am violating injunctions. No matter what the result may be to-morrow, if I go to jail for sixteen generations, I want you to do as you have done. Stand pat to a man. No man go back unless all go, and all stay out unless Phelan says go back."

It was a direct invitation to continue the course already taken under his direction of preventing the return of employ  s to the receiver, and of persuading the striking of others, and an avowed intention of disregarding the order of the court.

The punishment for a contempt is the most disagreeable duty a court has to perform, but it is one from which the court cannot shrink. If orders of the court are not obeyed, the next step is unto anarchy. It is absolutely essential to the administration of justice that courts should have the power to punish contempts, and that they should use it when the enforcement of their orders is flagrantly defied. But it is only to secure present and future compliance with its orders that the power is given, and not to impose punishment commensurate with crimes or misdemeanors committed in the course of the contempt, which are cognizable in a different tribunal or in this court by indictment and trial by jury. I have no right, and do not wish, to punish the contemnor for the havoc which he and his associates have wrought to the business of this country, and the injuries they have done to labor and capital alike, or for the privations and sufferings to

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which they have subjected innocent people, even if they may not be amenable to the criminal laws therefor. I can only inflict a penalty which may have some effect to secure future compliance with the orders of this court and to prevent willful and unlawful obstructions thereof.

After much consideration, I do not think I should be doing my duty as a judicial officer of the United States without imposing upon the contemner the penalty of imprisonment. The sentence of the court is that Frank W. Phelan be confined in the county jail of Warren county, Ohio, for a term of six months. The marshal will take the prisoner into custody, and safely convey him to the place of imprisonment.

[824] UNITED STATES *v.* AGLER.

(Circuit Court, D. Indiana. July 12, 1894.)

[62 Fed., 824.]

INJUNCTION AGAINST COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—JURISDICTION.—Under Act July 2, 1890, declaring illegal and punishing combinations in restraint of commerce among the states, and conferring jurisdiction on United States circuit courts to prevent and restrain violations of the act, the court has jurisdiction to issue an injunction to restrain such violation.*

SAME—TECHNICAL DEFECTS IN BILL.—That a bill for such injunction contains no prayer for process, this being a mere technical defect, although it renders the bill demurrable, does not affect the jurisdiction of the court or render the injunction issued thereon void.

SAME—DEFENDANTS NOT NAMED IN BILL, NOR SERVED WITH SUBPOENA.—An injunction for such purpose becomes binding, as against one not named in the bill, and not served with subpoena, when the injunction order is served on him as one of the unknown defendants referred to in the bill.

SAME—PROCEEDINGS TO PUNISH VIOLATION.—An information to punish violation of such an injunction order which fails to allege that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty.

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This was an information against Hiram Agler for contempt of court in disobeying an injunction. Defendant moved to quash the information.

F. B. Burke and Edwin Corr, for the United States.

McCullough & Spaan, for defendant.

BAKER, District Judge (orally).

It is well settled that a restraining order or injunction issued by a judicial tribunal without jurisdiction of the subject-matter is coram non judice and void. That is affirmed in all the books, and affirmed in the judgments of the supreme court of the United States that the counsel for the defendant has called the attention of the court to. Now, the question whether or not the circuit court of the United States had jurisdiction requires an examination of the statute, for the purpose of determining whether or not there is any law that authorized the court judicially to take cognizance of the sort of action that is set forth in the petition or bill.

Prior to the 2d day of July, 1890, it is entirely clear that the United States, as a municipal corporation, had no power, either by petition or bill, to go into the courts of equity of the United States, and invoke the aid of those courts, by their restraining power, to prevent interference with the carriage of the mails or with the carriage of interstate commerce. Prior to that time the sole remedy was on the criminal side of the court. The sole method in which the United States, as a government, could prosecute violators of the law who interfered with the carriage of mails or inter- [825] fered with the instrumentalities used in the conduct of interstate commerce, was by indictment or information on the criminal side of the court; but the growth of railways in this country, and the combinations of laborers employed on those roads for the purpose of enforcing, by strikes or otherwise, what they conceived to be their just rights, had led to a condition of things that, in the judgment of congress, made it imperative that the courts of the United States,—in other words, that the nation itself,—for the purpose of protecting the mails of the country, and for the purpose of protecting the passenger and freight traffic on interstate railroads, should

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have the right to invoke not only the criminal jurisdiction of the court by fines, or by sending to the penitentiary those who were guilty of violations of those laws, but that the government should also be clothed with the power—or rather the courts of the United States should be clothed with the power—of laying their strong hands on these men, and not waiting until crimes had been committed, but restraining, not for the purpose of preventing people from doing what is lawful, or to prevent their getting better wages, but for the purpose of saying to everybody that civil liberty cannot exist where combinations of men undertake by force and violence to arrest the peaceable and orderly conduct of business among the states. With that view of national duty, on July 2, 1890, congress enacted a law that enlarged the jurisdiction of the federal courts, and authorized them to apply the restraining power of the law for the purpose of checking and arresting all lawless interference with the peaceable and orderly carriage of mails, and with the peaceable and orderly conduct of railroad business between the states. This law was intended to lay its strong hand, not only upon the capitalists or monopolists who, by combinations, undertook to interfere with the business and commerce of the country, and subject them to punishment, but, on the other hand, it also undertook to say to the laboring men of the country that “you shall not enforce your rights, however just they may be, by violence and by lawlessness.”

Civil order cannot exist where men undertake by strong hand to enforce rights, whatever their rights may be. In civilized and organized society there is only one avenue that is alike open to the rich and the poor—that is, the avenue of the courts—for the purpose of settling disputes between men. No man has a right, even though he has been wronged, even though he may have been oppressed, to take the law into his own hands, and, by force and terrorism or threats, redress his wrongs. It means a condition of things that would be absolutely intolerable in civilized society, and it was in order that the peaceable and quiet and orderly processes of the law might be applied to men who are thus engaged, whether they were monopolists, on the one side, or laboring men, on the other, that the law was enacted for the purpose of ar-

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resting lawlessness, composing these disturbances, and bringing about that orderly and peaceful condition of affairs that is essential to the life and happiness of the community.

[826] Now, there is no doubt, in my judgment, that this act of July 2, 1890, did clothe the circuit court of the United States with this new and enlarged power. That, however, does not answer the entire contention of the counsel for the defense. He insists that the affidavit and information filed in this case does not reach and bind the defendant as charged, because, as he alleges, the bill does not contain a prayer for process; and he reads from an authority which is undoubtedly sound that a bill in equity without containing a prayer for process which shall embody the names of the defendants against whom process is prayed would be demurrable. That is undoubtedly the law. That, however, does not settle the question that is before the court. The question is whether or not if an injunction is issued by a court which has power to issue the injunction upon a bill, provided the bill is not demurrable, is the injunction void because, on investigation, the court believes that a demurrer might have been sustained to the bill if it had been interposed? In other words, does a mere defect that could be reached by demurrer, in a bill of which the court has jurisdiction,—over which the court has been given jurisdiction by the express terms of the statute,—is the injunction order a nullity, and can it be treated with contempt because the bill is defective, so that a demurrer might be sustained to it? On that proposition the court entertains no doubt. There is not an authority, in the judgment of the court, that can be found in the books—certainly the court is aware of none—in which it has ever been held that a man who was enjoined and had violated the injunction could escape punishment by alleging that, at the time the writ of injunction was issued, the bill was demurrable.

There is no doubt but what a number of men are named expressly by name. Eugene V. Debs, Howard, and some men here in this state are named by name. If, in the prayer for process, their names had been repeated, or if it had been simply stated in the prayer for process that the com-

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plainant, the United States, prays process against the parties above named, the bill would have been technically sufficient. Now, then, I assume that process of subpoena was issued against these men by order of Judge Woods, without their having been named in the prayer for process. It is a mere technical defect. It is one that does not, in the language of the supreme court, go to the jurisdiction of the court. The jurisdiction of the court depends upon the law of the land. Nor do I think it is necessary in this sort of cases for the government to file what is technically known as a "bill in equity" on the chancery side of this court as in a civil case. The right at all to file this sort of a proceeding is a new statutory right, and courts cannot—they would be derelict in the discharge of their duty if they did—disregard the purpose and object of the enactment of the law. I do not undertake to sit in judgment on either capitalists or laboring men. I have, as a magistrate, nothing to do with that. I am simply bound as a judge to take notice that a condition of things had grown up in this country of strikes, of interruption of mails, and interruption [827] and interferences with interstate commerce; that it provoked comment, and had created feeling; and, in order that labor troubles should be settled without interfering with the commerce and the happiness of millions of innocent people, it was determined that the national government should clothe its courts with power on the civil side to stop these things without waiting until crimes had been committed, and then send men to the penitentiary for the crimes so committed. That is the reason of it. It was intended to be a preventive remedy. That was the sole purpose of it. So far as this phase of it is concerned, it is true there are other sections that authorize men who do these things to be punished by fine of not more than \$5,000, and imprisonment for a year in state prison; but, so far as the civil side of it is concerned, it was intended to meet an emergency and a public exigency. It could not sue until the mails had been interfered with, or until the commerce of the country had been lawlessly stopped, but it was not intended, in my judgment, in order to invoke the judgment and jurisdiction of the court that all

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of the old nicety of pleading and practice of the English chancery courts should apply. The courts would be powerless if that were the case, to accomplish the beneficent purpose of the law, because it is a beneficent purpose. It is a praiseworthy purpose, in the midst of tumult and excitement, when lawlessness seizes upon the arteries of the commerce of the nation, for the courts of the land, in their peaceable and orderly way, to lay their hands on these men, and bid them cease. It is a lawful thing,—a commendable thing. The law gives them that power. So much, then, on the question of jurisdiction.

I think that in this proceeding the court (Judge Woods, as judge of the circuit court) had jurisdiction to issue this writ. Now, this party defendant is not named, and to say now that process of injunction may not be issued, to be binding upon men who are not named, or shall not be binding until they are actually served with subpoena, as they are on the civil side, on the equity side, of the court, it would defeat the purpose of the law. It is not within the language of the statute itself. I think the injunction as against unknown defendants is valid and binding when the injunction order is served upon them, although they are not at the time parties to the suit. Indeed, I think an injunction that is issued against one man enjoining or restraining him, and all that give aid and comfort to him, or all that aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that.

Now, then, the court having decided that it thinks the injunction was properly issued, and that, if it was actually served on this man as one of the unknown defendants, the injunction would be good, that brings us to the question of the technical sufficiency of the affidavit, because in this sort of proceeding, in my judgment, it is not essential that an information shall be filed, although there is no harm in doing that. The essential thing is the filing of a statement or charge that shall show clearly and distinctly that the [828] restraining order has been served on the defendant, or, if it has not been served on him, that he had notice or knowledge of its contents.

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Now, in this case, the information, I think, lacks considerable of having the certainty and precision that is essential. It is not alleged that this man was one of the unknown parties that are referred to in the injunction. It is not alleged that the restraining order was a lawful one, in the language of the statute. It does not allege,—and that is the most serious thing, to my mind,—that either by his words or his acts he was engaged in aiding the common object with other members of the American Railway Union. If what this man did was not done to give aid or comfort or encouragement to the object of arresting the mails, if it was an independent crime the man was committing, if he wanted to commit arson or robbery, without having any connection with these men that were engaged in the interruption of commerce, then he would not be within the terms of the restraining order, nor within the law, which has been read here,—the law of July 2, 1890. Now, it is not charged, although it has been assumed all the way through,—I suppose the proof adduced would go to show that,—that he was connected with the railway union, and that his acts were acts that were calculated in their nature to give aid and comfort to the strike that has been carried on. If those facts were proved, why they would be sufficient to satisfy the court that his mind was acting in combination with the minds of Debs and others, or that they were engaged in the common purpose, and hence that they were in the conspiracy that is mentioned in the statute, provided the things that they were trying to do would naturally result in delaying or interrupting the mails, or in delaying or interrupting the carriage of passengers and freight from one state to another. I think that in these particulars the affidavit is insufficient. I think the charge is sufficient, so far as showing that the court has jurisdiction to issue the writ, when it is shown by an affidavit that this man was engaged in the combination or conspiracy with other railroad men in aiding and assisting to arrest the mails and interstate commerce. I think the affidavit would show a cause of action against him, and then it would depend upon the proof whether or not the offense was made out.

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[840]

IN RE GRAND JURY.*

(District Court, N. D. California. July 13, 1894.)

[62 Fed., 840.]

CONSPIRACY—OBSTRUCTION OF INTERSTATE COMMERCE.—Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in interstate commerce is in violation of Act July 2, 1890, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the states.^b

MAIL—OBSTRUCTING PASSAGE.—It is a violation of Rev. St. § 995, declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up, though he is willing that the mail car shall go on, and his purpose is other than to retard the mails.

SAME.—The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed.

SAME.—Where the transportation of the mails and interstate commerce has long been interrupted by the refusal of the employes of the railway company to move trains carrying Pullman cars, it is the duty of the railway company to use every effort to move the mails and interstate commerce, without regard to the make-up of regular trains; and any willful failure to perform this duty is a violation of the statute.

GRAND JURY—FINDING—INDICTMENT.—An indictment should only be found where the grand jury believe that the evidence before them would warrant a conviction.

Charge to the grand jury by Morrow, District Judge:

[841] Gentlemen of the Grand Jury: You have been summoned and sworn as grand jurors of the district court of the United States for the northern district of California. It now becomes my duty to instruct you concerning the duties you will be called upon to perform under the laws of the United States.

The extraordinary occurrences in this state during the past two weeks require your immediate attention, and call for a

* The charges to the Grand Jury found in 62 Fed., 828 and 834, do not relate to the anti-trust law and are therefore not reprinted.

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thorough and sweeping investigation. It is a matter of public notoriety that during this time a great railroad strike has prevailed; that the most important channels of trade and commerce carried by railway service have been closed, the business operations of the state paralyzed, and the passage of the mails seriously retarded and obstructed at several points in the state. The constitution of the United States provides that congress shall have power to regulate commerce among the states and establish post offices and post roads. Pursuant to the first of these provisions, congress has provided by the Act of July 2, 1890, that

"Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile v. Kimball*, 102 U. S. 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826. The primary object of the statute was undoubtedly to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S. v. Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities from one state to another, and in this view the scope and purpose of the statute have been the subject of consideration in the courts, notably in the case of *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 995. That action was brought by the

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United States in the eastern district of Louisiana against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. The facts were that a disagreement had arisen between the warehousemen and their employes and the principal draymen [842] and their subordinates concerning the recognition that should be accorded by the employers to the demands of certain labor organizations in New Orleans, and it was threatened that unless there was an acquiescence in these demands all the labor organizations would leave work, and would allow no work in any department of business, and violence was threatened in support of the demands. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the street, and in some instances by violence, so that the result was that by the intended effects of the doings of the defendants not a bale of goods constituting the commerce of the country could be moved. It was held by the court that the facts of that case brought it within the provisions of the statute. In other words, it was determined that a combination of men who by violence and intimidation restrained trade and commerce among the several states or with foreign nations were acting in violation of this law, notwithstanding they may have had in view some other purpose in relation to their employment. You will observe that in this case the elements of intimidation and violence were present. It was not a case where the men merely quit work, putting their employers to no other inconvenience than of securing other men to fill their places, but it was a case where force and intimidation were used to prevent any one in that locality from engaging in the lawful and necessary business of moving the commerce of the country. The order granting an injunction in that case was affirmed by the circuit court of appeals in the fifth circuit. 6 C. C. A. 258, 57 Fed. 85. The law as thus declared by a court of recognized ability and authority was recently applied by Judge McKenna of the circuit court of this district in like manner to one feature of the state of affairs to which I am now directing your attention. This law de-

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termines that any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of the act of July 2, 1890.

Another agency of the government is involved in the transportation of the mails, and to protect and secure the efficiency of that branch of the service it has been enacted that all railroads or parts of railroads which are now or hereafter may be in operation are established as post roads (Rev. St. § 3964); that the postmaster general shall in all cases decide upon what trains and in what manner the mails shall be conveyed (section 3, Act March 3, 1879; 20 Stat. 358); and every railway company conveying the mails shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same (Rev. St. § 4000). It is further provided in section 3995 of the Revised Statutes that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver or carrier carrying the same, shall for every such offense be punished by a fine of not [843] more than \$100." This statute has also been before the courts in cases where bodies of men operating as labor organizations have prevented the passage of trains carrying the mails. In the case of *U. S. v. Clark*, in the district court of the United States for the eastern district of Pennsylvania (23 Int. Rev. Rec. 306, Fed. Cas. No. 14,805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. * * * The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several

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persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go on, but the passenger train should not. They uncoupled the mail, and afterwards coupled it for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go on."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that while nominally they permit the mail car to go, they really, by preventing the transit of other passengers cars, interfere with the transportation of the mails."

You will observe that the law is applicable to the case of an obstruction interposed for a purpose other than that of retarding the mails. This was decided to be the law by the supreme court of the United States as long ago as 1868 in the case of *U. S. v. Kirby*, where it was said:

"When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object." 7 Wall. 486.

In the case of *U. S. v. Thomas*, 55 Fed. 381, the transportation of the mails had been obstructed by some persons acting under the influence of a strike. Judge Jackson, in addressing the jury, submitted observations intended for the strikers. He said:

"You have no right to go into a strike and undertake to stop the transportation of the mails of the United States, undertake to stop the running of the cars of the country, or undertake to stop the business which is carried on the great highways of the country, and which is the mainspring to the success of a country like ours. If all this is done, then you step upon a right which you have no right to interfere with. I make these general remarks on [844] this occasion with a hope that I may reach the ear of the intelligent masses, that they may see at once the error they have fallen into. Rely not upon combination and strikes to protect your interests. They are disastrous, stopping your mills, and stopping the enterprises and business of the community which furnish the wage-earner the means to support his home. Do not resort to such measures to stop our manufactures, our mills, or the transportation of the mails of the United States, which is so great and important an element of

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our country for the comfort and welfare of society. If you take this thing up and look at it, and ponder over it, and see the result that must necessarily follow such a course of action, and the train of circumstances that must necessarily accompany it, you would refuse to enter into these combinations and strikes."

That the passage of the mails over certain lines of railroad in this state has been retarded and obstructed there is no question. The regular receipt and dispatch of mails over the roads of the Southern Pacific Company have in fact been suspended at the San Francisco post office for a period of about two weeks. Who is responsible for this state of affairs? The strikers, the railroad company, or both? The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. The damage and interruption caused by the elements usually receive prompt attention, that traffic may not be suspended longer than is absolutely necessary. The same energy and good faith should be observed with respect to the removal of labor and other difficulties. *Railroad Co. v. Hazen*, 84 Ill. 36. The present controversy between the Southern Pacific and its employes appears to be in relation to the movement of Pullman cars. Both parties to this controversy have announced in the public press that they have been ready and willing from the first to move freight cars and passenger trains without Pullman cars. In my opinion, the situation has been of such an extraordinary character, and the interruption to commerce and the transportation of the mails so serious and long-continued, as to have required of the railroad company to temporarily waive questions concerning the make-up of regular trains (as the officers of the company claim to have done), and employ such resources as the company had in the movement of other trains in an effort to relieve the prevailing congestion and distress. This obligation I believe to have been a public duty, and a willful failure to perform this duty with respect to the movement of the mails and interstate commerce is therefore, in my judgment, within the purview of the statute.

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It is your duty to determine this question under the law as I have stated it to you, and present the guilty parties to the court for prosecution. In this inquiry you will not limit your examination to the conduct of any particular class of persons, but carefully scrutinize the acts of all parties concerned, whether they are officers of the railroad company or employes, and without fear or favor or influence of any kind point out in the proper manner the persons who have transgressed the law and imperiled the best interests of this state. [845] It is our duty to uphold the authority and majesty of the law, and see to it that those who have violated its provisions, whoever they may be, are brought to the bar of justice.

In your inquiry you may find that parties have so associated themselves together in their conduct as to bring them within the law of conspiracy. The statute of the United States upon that subject is as follows:

Section 5440, Rev. St.: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The elements of this offense are the combination or conspiracy to violate the law, and the overt act or acts to carry the conspiracy into effect. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy.

It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, as we have seen, when the combination is proved, are as much responsible as if they had done the act themselves. You will observe in this connection that the act of combination to violate the statute is the important element in the crime of conspiracy. The law regards the act of un-

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lawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederation of several persons to commit crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments, distinctive from those prescribed for the crime the subject of the conspiracy. You can readily appreciate why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionally demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong. The statutes I have cited indicate the general character of the investigation you will be required to make concerning the affairs of the railroad company in the transportation of the mails and in the movement of interstate commerce. With the merits of the controversy between the railroad company and its employes you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United [846] States. The right of labor to organize for its own benefit and protection is not questioned. It has the same right in this respect as any other association, and, perhaps, in some respects, its freedom is properly greater. The laboring man is entitled to the highest wages and the best conditions he can command, but he is not entitled to interfere with the rights and property of others, and by force or other unlawful means seize upon the appliances of organized industry, and set at defiance the laws of the government. The right of workmen to quit work, either singly or in a body (subject only to the civil obligations of contracts), is not denied, provided that the abandonment of service is accomplished in a peaceful and orderly manner; and here again the privilege or freedom must be exercised without interfering with the rights and property of others. It may be said that this freedom or privilege accorded to the laboring men, with the restrictions named, is of no great value, since he is thereby prevented from securing the protection he ought

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to have for his labor, and the power to redress his grievances. This may be true, and it may be conceded that the relations of labor to capital present a difficult problem for solution, but it seems to me that the intelligence of the people ought to solve this question in a peaceful and proper manner. It certainly cannot, with the consent of the courts, be settled by violence or any unlawful means.

It will appear to you from what I have said that a very serious and important duty devolves upon you as grand jurors of this court. Your oath requires you to diligently inquire and true presentments make "of such articles, matters, and things as shall be given you in charge or otherwise come to your knowledge touching the present service." The oath indicates the impartial spirit with which your duties should be performed. You are to present no one from envy, hatred, or malice, nor should you leave any one unrepresented for fear, favor, affection, hope of reward or gain, but should present all things truly as they come to your knowledge, according to the best of your understanding. In each judicial district there is a United States attorney, appointed by the president to represent the interests of the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States attorney for this district will therefore appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws other than those I have mentioned which the government deems to have been violated, and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct. In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more, if in the course of your inquiries you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or [847] explain away the charge

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under investigation, it will be your duty to order such evidence to be produced. Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment you must be convinced, so far as the evidence before you goes, that the accused is guilty; in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury. To authorize you to find an indictment or presentment, there must be a concurrence of at least 12 of your number,—a mere majority will not suffice. You are to keep your deliberations secret, and allow no one to question you as to your own action, or the action of your associates on the grand jury. In the progress of your examinations, should questions arise concerning which you may desire further instructions from the court, you may come into court for that purpose, and the law will be further explained to you with respect to such questions.

[310] ARTHUR ET AL. v. OAKES ET AL.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

[63 Fed., 310.]

[This decision, although sometimes cited. was not based upon the anti-trust law. It was an appeal from certain injunctions issued in the case of *Farmers' Loan and Trust Co. v. Northern Pacific R. Co.*, 60 Fed. 803. On page 329 of the decision the court said:]

"In the course of the argument some reference was made to the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' (26 Stat., 209.) It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act, and upon the general principles that control the exercise of jurisdiction by courts of equity."

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[27] UNITED STATES v. ELLIOTT ET AL.*

(Circuit Court, E. D. Missouri. October 24, 1894.)

[64 Fed., 27.]

CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE—WHAT CONSTITUTES.—A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within Act July 2, 1890, § 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the states, is illegal.^b

SAME—INJUNCTION—POWER OF CONGRESS TO AUTHORIZE.—Act July 2, 1890, § 4, which provides that the circuit courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in congress to authorize such proceedings.

SAME—INJUNCTION ORDER—PERSONS NOT NAMED IN BILL.—Under Act July 2, 1890, § 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force on defendants not named in the bill, but who are within [28] the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them.

Bill by the United States against M. J. Elliott and others to restrain a conspiracy to obstruct and destroy interstate commerce in violation of Act July 2, 1890 (26 Stat. 209). A preliminary injunction was granted. 62 Fed. 801. Defendants demurred to the bill. Demurrer overruled.

Wm. H. Clopton, United States Attorney.

W. W. Erwin, *S. S. Gregory*, and *W. A. Shumaker*, for defendants.

PHILIPS, District Judge (orally).

This case was submitted yesterday on the demurrer filed to the bill by certain of the defendants. The district attor-

* Preliminary injunction granted (62 Fed., 801). See p. 262.

^b Syllabus copyrighted, 1895, by West Publishing Co.

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ney submitted the same on the pleadings; and the defendants, on the pleadings and an extensive brief. This suit grew out of the recent "strike," and the bill was filed on behalf of the United States, by the district attorney, under direction of the attorney general of the United States, to enjoin the defendants from the consummation of an organized conspiracy, which threatened to obstruct and was impeding the passage of the United States mails, and interfering with interstate commerce. The demurrer, of course, admits all the material allegations of the bill; that is, all facts which are well pleaded. These averments may be summarized as follows: It is charged, in substance, that the defendants have combined and confederated together to prevent the several railroads named in the bill,—being about all of the many important roads coming into the city of St. Louis, Mo.,—which are engaged in carrying the United States mails and in interstate commerce, carrying passengers and freights, from conducting their customary business in transporting passengers and freights between and among the different states of the Union, and foreign countries. It is further charged that said defendants have combined and conspired to induce persons in the employ of said railroads to leave the service of their respective companies, and to prevent the companies from securing the services of other persons in the place of those induced to quit, the object of such conspiracy being to prevent said railroad companies from hauling cars which are extensively used in the necessary transaction of their business in interstate commerce. The bill charges the commission of divers and sundry acts by the alleged conspirators in furtherance of the objects of the confederation. Among other things, it is alleged that certain of the defendants, under the leadership of one Debs, have issued orders and directions to persons in the employ of said railroads to act subject to their direction, whereby said employes have been commanded and required to cease from operating the respective railroads. It is further charged that certain of said defendants have threatened to tie up the entire operations of trains of such of said companies as refuse to accede to certain demands made upon them by the leaders of the conspiracy, and that it is the purpose and object of the defend-

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ants to so obstruct and cripple [29] the business of said roads as to prevent them from performing their duties and functions as common carriers of freights and passengers among the several states through which the several lines of said roads pass. It is further alleged that it is among the objects and plans of said conspirators to control the interstate commerce between the city of St. Louis and points in other states, and thereby prevent the owners of said roads from exercising any independent control thereof in the transaction of interstate commerce. The bill further sets up, what is quite an historic fact in commercial circles, that the city of St. Louis is a large live-stock market for the sale and slaughter of cattle and hogs, and the preparation of the same for food, and is also a large manufacturing center, from which point these food supplies and manufactured articles are distributed to various points throughout the United States, and other necessities of life, which have become essential to the commerce, growth, and development of the country, and for its domestic life, and that the aforesaid interference with the transportation of these supplies is a great public detriment, not only to said city, of 600,000 people, but to all the people of the various states reached by the exertions and efforts of this distributing point, who, by the course of business, have become largely dependent upon this source of supply. The object of the bill is to have these parties, and their aiders and abettors, enjoined and restrained from the further prosecution of their unlawful purpose and dangerous conspiracy.

The demurrer raises the question of the jurisdiction of this court over the subject-matter, and the right of the United States to bring such suit in equity; and various other suggestions are made, of minor importance. As recited in the temporary order of injunction made by Judge THAYER, the suit was instituted upon the authority of the attorney general of the United States, and the bill is properly sworn to, in the usual form. I do not propose to go into any extended discussion of the many various questions discussed by counsel in the brief.

It is a fact of supreme importance, to be stated at the very threshold of this discussion, that the regulation and control

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of commerce among the states of the Union, and with foreign nations, is, by the federal constitution, reposed exclusively in the congress of the United States. The felt necessity of this federal jurisdiction was the one great impelling cause that led to the formation of the federal Union, and the adoption of the federal constitution. As early as 1778 this question was pressed upon the consideration of congress by a memorial from the state of New Jersey, and in 1781 Dr. Witherspoon, one of the statesmen of that day, presented a resolution which declared that "it is indispensably necessary that the United States, in congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial, or contrary to the common interests." And in 1786 Virginia adopted a resolution appointing commissioners to meet with like commissioners from other states, and the resolution to that effect, formulated by Mr. Madison, recited in the preamble that "Whereas, the relative situation of the United States has [30] been found on trial to require uniformity in their commercial regulations," etc. That great jurist, Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 445, most aptly presents this matter, as follows:

"The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view of their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great Revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?" "The power is coextensive

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with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior." "Commerce is intercourse. One of its most ordinary ingredients is traffic."

In the passion of the hour, we are apt to forget the pit from which we were dug, and the rock of permanency upon which our feet were planted, by the wise and patriotic men who constructed the fabric of our government. The power to regulate commerce among the states carries with it, as the supreme court has repeatedly held, the power to protect and defend.

On July 2, 1890, congress passed the law entitled "An act to protect trade and commerce against unlawful restraints and monopolies," section 1 of which is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." It may be conceded that the controlling, objective point, in the mind of congress, in enacting this statute, was to suppress what are known as "trusts" and "monopolies." But, like a great many other enactments, the statute is made so comprehensive and far-reaching in its express terms as to extend to like incidents and acts clearly within the expression and spirit of the law. It declares that every act, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the states, or with foreign nations, is forbidden. Therefore, any combination or confederation among two or more persons, in restraint of trade or commerce, comes within the express letter of the statute. The term "restraint of commerce" was used in its ordinary, business understanding and acceptation. Among the recognized meanings of the word are "prohibition of action; holding or pressing back from action; hindrance; confinement; restriction." It is a restriction or hindrance created by the application of external force. It is a vis major applied directly and effectually to carriers of [31] interstate commerce, which prevents them from operation. *Olivera v. Insurance Co.*, 3 Wheat. 193. It was perfectly competent for congress, in the exercise of its constitutional jurisdiction of the whole subject of such commerce, to pass laws to prevent and suppress unlawful conspiracies and com-

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binations to interfere with the operation of such commerce. Accordingly, section 4 of said act provides that:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." "When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It was pursuant to this statute, *inter alia*, that Judge THAYER issued the temporary restraining order in this case. I am unable to perceive the force of the argument against the power of congress to authorize such civil proceedings in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction and destruction of interstate commerce and trade before it is accomplished. It was just as competent for congress to provide this civil remedy of prevention as it was to provide for punishment in a criminal proceeding for the unlawful conspiracy entered upon or consummated.

It is urged by counsel for defendants that courts of equity will not interpose by injunction to prevent the commission of an act which, when done, would be a crime penally punishable. This is an "old saw." It is a general rule of equity jurisprudence that courts of chancery will not interpose where there is an adequate remedy at law, nor will they ordinarily interpose to prevent the commission of a crime. A well and long established exception to this rule is that where parties threaten to commit a criminal offense, which, if executed against private property, would destroy it, and occasion irreparable injury to the owner, and especially where such destruction would occasion a multiplicity of suits to redress the wrong if committed, courts of equity may interpose by injunction to restrain the threatened injury. The law, it does seem to me, would be very imperfect, and indeed impotent, if a number of irresponsible men could conspire and confederate together to destroy my property,

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to demolish or burn down my house, that I should be remitted alone to the criminal statutes for their prosecution after my property was destroyed. Most generally, such law-breakers who engage in such conspiracies are a lot of professional agitators. They have no property to respond in damages. Their tongues are their principal stock in trade; and inasmuch as imprisonment for debt is abolished, and cruel and unusual punishments are prohibited, an execution would be quite unavailing. It certainly presents a case that most strongly appeals to the strong arm of a court of equity to reach forth to pre- [32] vent great injury and loss, as the only means of conserving the rights of private property. It is now a well-recognized office of a court of equity to conserve and preserve the rights of private property in advance of its molestation and appropriation, where, from the peculiar circumstances, the remedy at law might be of doubtful restitution. In the recent case in Chicago, in which E. M. Arthur was intervener, against Thomas F. Oakes et al. (63 Fed. 310), Mr. Justice Harlan, in reviewing the restraining order issued by Judge Jenkins, has very effectually met this objection, and presented the law respecting unlawful conspiracies with a force and clearness to forever set this question at rest. It may not be out of place here to say that no public decision has perhaps been so much misunderstood, or ignorantly or intentionally misrepresented and perverted, as that of the distinguished jurist. The opinion recognizes the right of employes and labor organizations, in the absence of a contract binding the employé to a given term of service, whenever they become dissatisfied with their employment or their wages, to quit the service of the employer, either separately or collectively; and they have a right, by preagreement or preconcert of action, to unite together for taking peaceful and lawful means to secure an increase of wages; to withdraw, separately or in a body, from the service of the employer, when dissatisfied. It is not competent for the courts to interpose to restrain their right of volition, which is among the natural and inalienable rights of every citizen, to work for whom he pleases, where he can get employment, and to quit whenever he is dissatisfied therewith. But the opinion distinctly an-

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nounces the further proposition that such men have no right to conspire and combine together, not only for the purpose of securing better conditions and wages, and quit service if not secured, but to go further for the purpose of preventing the employer from supplying the places vacated with other employes, who are ready and willing to take their places; that they have no right to combine and confederate together for the purpose of wantonly injuring and destroying the property of their employer, and to obstruct and interfere with his dominion over and control of his private property. An act which, if done by an individual, may be lawful, may become quite a different thing when undertaken to be done by a confederation among many, having for its inspiration the purpose of injuring and destroying the property of another, by preventing him from prosecuting his business by taking into his service others to supply the places of those who voluntarily have gone out. So the learned justice says:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employes would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operations of the railroad under their management, either by disabling or rendering unfit for use the engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control or management of the property, or by using force, intimidation, threats, or other wrongful methods against the receivers or their agents, or against employes remaining in their service, or by using like methods to cause employes to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests [33] of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals, who, in the exercise of their inalienable privilege of choosing the terms upon which they will labor, enter or attempt to enter the services of those against whom such combinations are aimed. And as acts of the character referred to would have defeated the proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the circuit court properly framed its injunction so as to restrain all such acts as have specifically been set forth, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad."

Further on, he says:

"In our consideration of this case, we have not overlooked the observation of counsel in respect to the use of special injunctions to pre-

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vent wrong which, if committed, may be otherwise reached by the court."

Then, after observing that this jurisdiction of a court of equity should be cautiously and conservatively exercised, said:

"It will be refused until the court is satisfied that the case before it is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its suitors and its own principles to administer the only remedy the law allows, to prevent the commission of the act. The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done, in order to protect rights and property against irreparable damages by wrongdoers."

Then, quoted from Mr. Justice Story, the following:

"The jurisdiction of these courts thus operating by special injunction is manifestly indispensable for the purpose of social justice, in a great variety of cases, and therefore should be fostered and upheld by a steady confidence."

The court then concludes with the statement that no other remedy than that of injunction, to meet such extraordinary conditions of affairs, was full and complete for the protection of the property, and "for the preservation of the rights of the public in its due and orderly administration by the courts." The court then says:

"That some of the acts enjoined can criminally subject the wrongdoers to actions for damages, or to criminal prosecution, does not therefore, in itself, determine the question as to interference by injunction. If the acts stop at crime, or involve merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involve the irreparable injury to and destruction of property, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate."

This doctrine was long ago announced by so distinguished a jurist as Mr. Justice Story, who said:

"If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country."

As said by Judge THAYER in granting this provisional injunction:

"A combination whose professed object is to resist the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states; and under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means."

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[34] It would present a most anomalous state of affairs, in a country like this, if men, because of some supposed or real grievance with an employer in a distinct business, should be permitted to confederate and conspire together for the purpose of coercing the employer into acceding to their demands, and, as a means to a specific end, tie up and stop independent railroads extending from the Pacific coast to the Lakes on the north and northeast, deaden all the engines on the tracks; thereby intercepting the transportation of passengers and the necessary supplies passing from one state to another, and stop the shipment of cattle, sheep, hogs, corn, wheat, oats, fruits, and vegetables. It is impossible to state in language the far-reaching destructiveness and ruin of such a scheme, if permitted to proceed to accomplishment. The business of this country has adjusted itself to operations of interstate commerce. Large communities of people are dependent for the necessities of life upon the agricultural products of other communities. While we have a state here with a productive energy and capacity for producing nearly all the necessities of life, yet, because of the fact that other localities can produce with less labor and more profit certain supplies than the local community, people forbear giving attention to the production of articles which they can thus obtain more cheaply and readily, and depend therefor upon other communities, and the railroads for transporting such supplies from one state to another. If persons may combine and confederate together to stop the railroad trains from passing from one city and one state to another, it is easy to be seen how quickly and readily they could produce ruin, famine, and death in our great cities. They could cut off such necessities for the sustenance of life as an adequate supply of coal, and in one month, or less, produce a coal famine in city and country. It certainly ought to be permissible to the government, representing the whole people, to interpose, to preserve and protect the public life and the public health. The framers of the federal constitution builded wisely when they gave to congress control over our interstate commerce. With prophetic eye, they looked far into the future of their country, and foresaw the development of its commerce, and the absolute necessity of the free-

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dom of commercial intercourse between the different communities extending from ocean to ocean. The fact that congress did not enact the statute above recited until 1890, is no argument against the existence of its power. Many powers lodged by the constitution in the legislative department long lie dormant, until the exigency arises to invoke them into activity. As said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 620:

"When we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

Congress passed the act of 1890 in response to the public necessities. And as the sequel proved, in the great extremity to which the country was forced last summer, the framers of the law "builded wiser than they knew." The furious assaults made on the federal [35] judiciary in connection with this trouble, for grasping jurisdiction, are wholly unwarranted, in view of the express authority given the courts by said act of congress. The federal courts are the creation of the federal constitution, and the laws made in pursuance thereof. It is their office to execute, and not make, the laws. They possess just such powers, and all the power and jurisdiction, as are conferred on them by the supreme law of the land. And when they come in the exercise of the jurisdiction with which they have been clothed by an express act of the federal legislature, and grant injunctions, as they did last summer, against unlawful combinations of men, to restrain and prevent the operations of the unreasoning and unappeasable spirit of the mob, in the protection of the freedom of trade and commerce, to break the blockades on the public highways so as to open up travel and the transportation of the United States mails, and restore by civil processes the healthful glow and flow of a nation's commerce, they come as servitors, within the meaning of the preamble to the federal constitution, "to establish justice," and to conserve the public welfare. In such office they deserve the commendation of all good men, rather than the hurtful criticisms to which they have been exposed. It is well, in such a crisis, that the American people should be reminded that this

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is a government of law, and not of the tumultuous assembly controlled by one spirit to-day, and by another to-morrow.

Objection is made in the demurrer and the brief of counsel that the restraining order granted in this case went against parties not named specifically in the bill and the restraining order. The language of the provisional order in this respect is as follows:

"It is ordered that the aforesaid injunction, with writ of injunction, shall be in force and binding upon such of the defendants as are named in said bill, * * * and shall be binding upon such defendants whose names are not stated, but who are within the terms of this order."

The order further directed that the injunction should be operative upon all persons acting in concert with the designated conspirators, and under their direction and control, and where parties were not named especially in the writ, but were found to be acting in concert with and under the direction of the alleged conspirators, and commit some act in furtherance of the conspiracy, then the marshal should serve the writ upon them, and if, after service of the writ upon them, they did any act in violation of the injunction, they would come within the terms of the restraining order. This, I think, it is competent for the court to do, under section 5 of the act aforesaid, and that it was conformable to the custom and usage of courts of equity, where there are engaged such large numbers of unknown persons in such unlawful conspiracy. As the order of injunction was not to become operative upon them until served with a copy thereof, it does not lie in their mouths to question the regularity of the proceeding. My conclusion is that the bill is sufficient, and the demurrer is overruled.

[724] UNITED STATES *v.* DEBS ET AL.*

UNION TRUST CO. *v.* ATCHISON, T. & S. F. R. CO.

(Circuit Court, N. D. Illinois. December 14, 1894.)

[64 Fed., 724.]

CONTEMPT—PROCEEDING IN EQUITY—CONCLUSIVENESS OF ANSWER.—

In proceedings for contempt in equity, a sworn answer, however full

* Writ of habeas corpus denied (158 U. S., 564). See p. 565. Debs was also indicted, with others, for conspiracy to obstruct the mails (65 Fed., 210). That decision not reprinted. Anti-trust law not considered.

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and unequivocal, is not conclusive, even in the case of a stranger to the bill for the injunction which has been violated.*

SAME—JUSTIFICATION—IRREGULARITIES.—Where a court had jurisdiction of an injunction suit, and did not exceed its powers therein, no irregularity or error in the procedure or in the order can justify disobedience of the writ.

[725] **SAME.**—In a proceeding for contempt in disobeying an injunction, the sufficiency of the petition for the injunction, in respect to matters of form and averment merely, cannot be questioned.

EQUITY JURISDICTION—RESTRAINING PUBLIC NUISANCE.—Equity has jurisdiction to restrain public nuisances on bill or information filed by the proper officer, on behalf of the people.

CONTEMPT—TRIAL BY COURT.—Though the same act constitute a contempt and a crime, the contempt may be tried and punished by the court.

COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—SCOPE OF THE STATUTE—CONSPIRACY.—Act July 2, 1890 (26 Stat. 209), § 1, declaring illegal "every contract, combination in the form of trust, or otherwise, or conspiracy" in restraint of trade or commerce among the states, or with foreign nations, is not aimed at capital merely and combinations of a contractual nature, which by force of the title, "An act to protect trade and commerce against unlawful restraints and monopolies," are limited to such as the courts have declared unlawful, the words "in restraint of trade" having, in connection with the words "contract," and "combination," their common-law significance, but the term "conspiracy" is used in its well-settled legal meaning, so that any restraint of trade or commerce, if to be accomplished by conspiracy, is unlawful.

SAME—CONSTRUCTION.—The construction of the statute is not affected by the use of the phrase "in restraint of trade," rather than one of the phrases "to injure trade" or "to restrain trade."

SAME—COMMERCE.—The word "commerce," in the statute, is not synonymous with "trade," as used in the common-law phrase "restraint of trade," but has the meaning of the word in that clause of the constitution which grants to congress power to regulate interstate and foreign commerce.

SAME—FORFEITURE OF PROPERTY.—The provision of Act July 2, 1890, § 6, for forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one state to another, or to a foreign country," does not imply that only cases in which property shall be found subject to forfeiture shall be deemed within the scope of the act.

EQUITY JURISDICTION—RIGHT TO JURY.—The power given by Act July 2, 1890, to circuit courts "to prevent and restrain violations" of the act, is not an invasion of the right of trial by jury, as the jurisdic-

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tion so given to equity will be deemed to be limited to such cases only as are of equitable cognizance.

CONTEMPT—VIOLATION OF INJUNCTION—CONSPIRACY.—Where defendants, directors, and general officers of the American Railway Union, in combination with members of the union, engaged in a conspiracy to boycott Pullman cars, in use on railroads, and for that purpose entered into a conspiracy to restrain and hinder interstate commerce in general, and, in furtherance of their design, those actively engaged in the strike used threats, violence, and other unlawful means of interference with the operations of the roads, and, instead of respecting an injunction commanding them to desist, persisted in their purpose, without essential change of conduct, they were guilty of contempt.

SAME—INTERFERENCE WITH RECEIVER.—Any improper interference with the management of a railroad in the hands of receivers is a contempt of the court's authority in making the order appointing the receivers, and enjoining interference with their control.

Proceedings for contempt against Eugene V. Debs and others for violation of injunctions issued, one on complaint of the United [726] States, and the other on petition of the receivers of the Atchison, Topeka & Santa Fé Railroad Company, appointed in a suit against that road by the Union Trust Company.

These informations were filed July 17, 1894. The substance of the first is:

That on the 2d day of July, 1894, the United States of America filed with the clerk of this court an information or complaint charging, among other things, that the defendants, Eugene V. Debs, George W. Howard, L. W. Rogers, Sylvester Kellher, the American Railway Union, and others, were engaged in a conspiracy unlawfully to interfere with and to prevent the transportation of the mails and interstate commerce over and upon the several railroads named in the complaint, and praying an injunction. That on that day, by order of the court, a writ of injunction was duly issued, whereby the defendants, and all persons combining and conspiring with them, and all persons whosever, were commanded and enjoined "to desist and refrain"—

(1) From in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following named railroads: Atchison, Topeka & Santa Fé Railroad; Baltimore & Ohio Railroad; Chicago & Alton Railroad; Chicago & Eastern Illinois Railroad; Chicago & Erie Railroad; Chicago & Grand Trunk Railway; Chicago & Northwestern Railway; Chicago & Western Indiana Railroad; Chicago, Burlington & Quincy Railroad; Chicago Great Western Railway; Chicago, Milwaukee & St. Paul Railway; Chicago, Rock Island & Pacific Railway; Cleveland, Cincinnati, Chicago & St. Louis Railway; Illinois Central Railroad; Lake Shore & Michigan Southern Railway; Louisville, New Albany & Chicago Railway; Michigan Central Railroad; New York, Chicago & St. Louis Railroad; Pennsylvania Company; Wisconsin Central lines; Wabash Railroad; Union Stock-Yard & Transit Company,—as com-

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mon carriers of passengers and freight between or among any states of the United States;

(2) "From in any way interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states;

(3) From in any manner interfering with, hindering, or stopping any trains carrying the mail, and from in any manner interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states;

(4) From in any manner interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states;

(5) From entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportation of passengers or property between or among the states;

(6) From injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads, and from injuring, destroying, or in any way interfering, with any of the signals or switches of any of said railroads, and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States;

[727] (7) From compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employes of any of said railroads to refuse or fail to perform any of their duties as employes of any of said railroads in connection with the interstate business or commerce of said railroads, or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the states;

(8) From compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employes of any of said railroads who are employed by such railroad and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states, to leave the service of such railroads;

(9) From preventing any persons whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states;

(10) From doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate

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commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and

(11) From ordering, directing, aiding, assisting, or abetting, in any manner whatever, any person or persons to commit any or either of the acts aforesaid."

That the American Railway Union is a voluntary association, of which many thousand railway employes were at the time of the filing of the bill, and still are, members. That the defendant Eugene V. Debs is the president of the association; George W. Howard, its vice president; Sylvester Kellher, secretary and treasurer; L. W. Rogers, one of the directors; and all of the defendants were and are directors. That the avowed purpose of said union and its officers has been, and still is, to procure all of the employes of the railways within the United States to become members, and to concentrate the power and jurisdiction of the union and its members under one official control, with authority to order strikes, or a discontinuance of the service of such employes with any of the railway companies of the United States, at any time when the union, its board of directors or other officers, should elect so to do, with or without sufficient cause. That on the 26th or 27th day of June, last past, prior to the filing of the bill and the issuing of the writ of injunction, the union, or its board of directors or other officers, including the defendants, had directed and ordered all its members engaged in the service of the Illinois Central Railroad Company in the transportation of the mails, and of interstate commerce, and all other trains controlled and operated by that company, to strike or quit service. That thereafter, and before the writ of injunction was issued, similar orders were issued to the employes of other railway companies, named in the bill of complaint; and that, in pursuance to those orders, all employes who were members of the American Railway Union did in a body leave the service of said railway companies, for the avowed purpose of hindering, preventing, and delaying the operation of trains engaged in the transportation of the mails and interstate commerce. That the order of injunction was published in the daily papers of Chicago on the morning of July 3, 1894. That each of the defendants had knowledge that the order had been duly entered in said cause. That a copy was served upon the defendant Rogers on the 3d day of July, and upon the defendant Eugene V. Debs early on the morning of July 4th, and upon the defendants George W. Howard and Sylvester Kellher on the 4th day of July, 1894. That the American Railway Union, prior to the 2d day of July, had organized many local unions upon substantially all the railroads in the northwest, from Chicago to California, including substantially all the railroads to the Pacific coast, and at the same time was engaged in organizing local unions upon the main lines of road extending from Chicago to the Atlantic coast; and that the work of organization and extension was [723] continued without change or interruption, after the service of the injunction, for the avowed purpose of conferring upon the union authority to order strikes upon all of the roads as rapidly as the local unions could be organized.

That the orders for strikes and for the railway employes to leave in a body the service of the railroads named in the bill of complaint, as well as other railroads, were generally communicated by telegram from the defendant Debs to the officers or committees of local unions at the most important railway centers and cities. That copies of some of such telegrams and orders, so issued by the defendant Debs, both before and after the service of said writ of injunction, are herein inserted, for the purpose of showing that the service of the injunction did not affect or change the policy or conduct of the defendants

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relative to said strikes, but that, on the contrary, the defendants continued, notwithstanding the order of the court, and in direct and open violation thereof, to direct the employes of the railway companies named in the writ of injunction, as well as other railway companies, to leave the service of the companies in a body, and thereby hinder, delay, and prevent the discharge of their duty to the public, and especially the discharge of their duties as agents of the government in the transportation of the mails, as well as interstate commerce. That said telegrams, and hundreds of other telegrams, similar in form and character, were sent by the defendant Debs (with the knowledge, authority, and approval of each and all of the other defendants, as well as other directors of the American Railway Union), after the service upon them of the writ of injunction; and that, in pursuance of said orders and directions, many of the employes of the several railways named were induced to leave the service, and so-called "railway strikes" prevailed generally upon the lines of several of said railway companies, and the transportation of the mails and interstate commerce was thereby greatly hindered, delayed, and prevented, and upon some lines for several days.

That, as a direct result of the orders to strike upon some of the lines,—notably upon the Illinois Central Railroad, the Chicago, Rock Island & Pacific, the Chicago, Burlington & Quincy, the Chicago & Alton, the Chicago & Western Indiana, and upon the Pennsylvania Company's lines,—there was exercised upon the part of many of the strikers or ex-employes of the railway companies intimidation and open violence. That employes who refused to join in the strike, and others who had been employed by the railway companies to take the place of strikers, and were in the actual service of the companies, were assaulted and intimidated by the strikers, and driven from their post of duty, either by physical violence or threats of personal injury. That, during the 5th, 6th, and 7th days of July, the strikers, and others acting in sympathy with them, took forcible possession of some of the roads within and adjacent to the city of Chicago, and, by physical force, prevented the passage of trains carrying mails and interstate commerce. That engines and trains of cars were derailed, and passenger trains were assailed with stones and other missiles, as well as the employes in charge of such trains; and in some instances both the passenger cars and engines were fired upon, endangering the lives both of employes and passengers. That these mobs were in many instances led by the strikers or ex-employes of the railway companies, who had gone out of service upon the orders of the defendants as officers of the American Railway Union; and mobs composed of strikers and others were massed at different points, upon the different lines of road, within and adjacent to the city of Chicago, in such numbers as to be beyond the control of the government, state, and municipal authorities. That at least 1,000 freight cars belonging to the railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. Signal towers and other appurtenances of the railways were burned. Employes of the railway companies who refused to obey the orders of the defendants and other officers of the American Railway Union, and remained faithful to the discharge of their duty, were violently assaulted, beaten, and bruised, and in some instances were forcibly arrested, and taken from their engines, and kept for hours in confinement. That many lives were also sacrificed,—all of which was a direct result of the numerous strikes ordered as aforesaid.

[729] That the defendants had full knowledge that many of such violent acts upon the part of the strikers or ex-employes of the railroads had been perpetrated prior to the service of the injunction;

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and notwithstanding such knowledge, and the further knowledge that violence invariably follows all strikes of a similar character, they daily and continuously, and in willful violation after the service of the injunction, issued their orders and directions for the employes of the railways to quit service in a body, and also continued such orders while the mobs were in partial possession of the railroads, and engaged in forcible resistance of the orders of this court and its officers.

That the strikes were not ordered on account of any wrongful act of the railroad companies, or of their officers, towards the members of the American Railway Union or other employes of the railroad companies; but on the contrary, the avowed purpose of the directors of the Railway Union, including the defendants, was wrongfully and unlawfully to establish a boycott against Pullman sleeping cars, which were used in great numbers by the railroad companies in trains carrying the mail and passengers traveling from state to state, and through the several states; and, to make boycott effectual, the directors of the American Railway Union, including the defendants, ordered that no trains or cars of any kind or character should pass over the tracks of any road within and adjacent to the city of Chicago until the use of Pullman cars had been abandoned by all of said railroad companies.

That the board of directors of the American Railway Union, including the defendants and its authorized agents, assume the authority and power, and, as complainant believes, have full authority and power, to order strikes and boycotts, and to discontinue the same, under the rules of the American Railway Union.

That such assumed power and authority is clearly shown by a communication signed by Debs, Howard, and Kellher, as officers of the union, and addressed to the railway managers, on the 12th of July, of which the following is a copy:

"CHICAGO, July 12, 1894,

"To the Railway Managers—

GENTLEMEN: The existing troubles growing out of the Pullman strike having assumed continental proportions, and there being no indication of relief from the wide-spread business demoralization and distress incident thereto, the railway employes, through the board of directors of the American Railway Union, respectfully make the following proposition as a basis of settlement:

"They agree to return to work in a body at once, provided they shall be restored to their former positions without prejudice, except in cases, if any there be, where they have been convicted of crime.

"This proposition, looking to an immediate settlement of the existing strike on all lines of railway, is inspired by a purpose to subserve the public good. The strike, small and comparatively unimportant in its inception, has extended in every direction, until now it involves or threatens not only every public interest, but the peace, security, and prosperity of our common country. The contest has waged fiercely. It has extended far beyond the limits of interests originally involved, and has laid hold of a vast number of industries and enterprises in no wise responsible for the differences and disagreements that led to the trouble. Factory, mill, mine, and shop have been silenced; widespread demoralization has away. The interests of multiplied thousands of people are suffering. The common welfare is seriously menaced. The public peace and tranquillity are imperiled. Grave apprehensions for the future prevail.

"This being true,—and the statement will not be controverted,—we conceive it to be our duty as citizens, and as men, to make extraordinary efforts to end the existing strife and approaching calamities whose shadows are even now upon us. If ended now, the contest, however serious in some of its consequences, will not have been in

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vain. Sacrifices have been made, but they will have their compensations. Indeed, if lessons shall be taught by experience, the troubles now so widely deplored will prove a blessing of inestimable value in the years to come. The differences that led up to [730] the present complications need not now be discussed. At this supreme juncture, every consideration of duty and patriotism demands that a remedy for existing troubles be found and applied. The employes propose to do their part by meeting their employers halfway. Let it be stated that they do not impose any serious condition of settlement except that they be returned to their former positions. They do not ask the recognition of their organization or any organization.

"Believing this proposition be fair, reasonable, and just, it is respectfully submitted, with the belief that its acceptance will result in the prompt resumption of traffic, the revival of industry, and the restoration of peace and order.

"Respectfully,

E. V. DEBS, *President*,

"G. W. HOWARD, *Vice President*,

"SYLVESTER KELIHER, *Sec'y*,

"*American Railway Union.*"

That the authority exercised over the members of the union by its board of directors, and by Debs, as its president, relative to the movement of trains, is shown by an order issued on the 2d day of July, 1894, of which the following is a copy:

"*To the Panhandle Yard Men—Greeting:*

"Please execute the orders of Mr. John Brenock in reference to the removal of dead stock from the stock yards to Globe station. This is issued by order of the board of directors, in the interest of public health.

"EUGENE V. DEBS, *President.*"

That the following report of an interview with the defendant Debs was published in the Chicago Herald of July 15th:

"We are in condition to keep the strike on for months. Nothing but armed intervention to-day permits the moving of trains. Throughout that great stretch of country which lies west of the Mississippi river our men are steadfast and willing to wait until the bitter end. You will notice that it is impossible to buy a ticket to the Pacific coast in Chicago to-day, except by way of the Great Northern Road, over which no Pullman cars are run, and against which we have no possible grievance. This shows the line on which our future campaign is to be carried. We shall keep the men of the West, where the air is purer and wholly free from plutocratic combinations, in line with our ideas. We shall persist in our work of organization throughout the East. As a road throughout the country hitherto unorganized by us falls into line, we shall call it out. And we shall keep on doing this until the very end of all things. If our present struggle, based, as it is, on motives wholly disinterested, be successful, there is no wage earner in the land who will not feel its beneficent effects before the year closes. And if this is true, when the command of the so-called 'arteries of commerce' falls into our hands, and the trades' unions which have given us comfort require reciprocation from us, we, and we alone, are in a position to give them material assistance. This is an axiom, and I believe no one will disagree with me."

ANSWER OF DEBS, HOWARD, ROGERS, AND KELIHER.

The defendants, being in custody under a writ of attachment issued by order of the court, Judge Seaman presiding, filed on the 28d of

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July a joint answer, admitting specified averments of the information, and in substance alleging:

That the purpose of the American Railway Union was the protection of all its members in their rights and interests as employes of the various railway systems of the United States, and to procure for them, by all lawful means, fair and adequate compensation for the service performed by them. That membership in the American Railway Union was open to every employe of good personal character and reputation, engaged upon the railway systems of the United States; and that to better secure and effectuate the objects of the union, as hereinbefore set forth, it was the desire and one of the purposes of the union to procure all such persons to become members. That, by the organization of the said American Railway Union, strikes could only be declared or discontinued by the vote of a majority of the members of such American Railway Union employed in the service affected by any [731] such strike; and that the only power, authority, or office of the officers or directors of the American Railway Union, or of these defendants, or either of them, in respect to said matter, was to notify the members of the union in the service concerned in such strike of the action taken by such majority. That, on or about the 26th or 27th day of June (contrary to the averments of the information), a majority of the members of the American Railway Union employed upon the Illinois Central Railroad and upon the other roads referred to in the information did for themselves, without any order, direction, or control of the American Railway Union, or of its officers or directors, or of these defendants, or any of them, voluntarily determine by vote that they would strike or leave the service of said railway companies; and that, in pursuance of that vote, the employes did, on or about the time stated, leave the service of the railway companies freely, and of their own accord, without any order, direction, or control on the part of said American Railway Union, its officers or directors, or of these defendants, or any of them. "Upon information and belief, the defendants deny that the employes so leaving the service of said railway companies, as aforesaid, did so for the purpose of hindering, preventing, and delaying said railway companies in the operation of trains engaged in the transportation of the United States mails and interstate commerce over the respective roads of said companies." They "deny that, after the service of said injunction, they or either of them carried on the work of organization other than by generally advising railroad employes to become members of such union, and receiving to membership persons so applying therefor as aforesaid. They expressly deny that the organization of said unions upon said roads, or any of them, was intended to confer or did confer upon said American Railway Union, its officers or directors, or upon these defendants, or either of them, the power and authority to order strikes upon said roads, as alleged in said information or otherwise, but, on the contrary, allege that strikes could be ordered upon said road by the employes of said road themselves, and that such employes were in no manner subject to the authority or control of said American Railway Union, its officers or directors, or of these defendants, or either of them, in that regard." "They deny that orders to strike were at any time or in any manner communicated by said American Railway Union, its officers or directors, or these defendants, or either of them, to said local unions, or any of them, as alleged in said information or otherwise."

"The defendants deny that any one of the telegrams set forth in said information was sent, or caused to be sent, by them, or any of them, or that they authorized or approved the same, or any one thereof, except a certain telegram dated July 6, 1894, in the words

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and figures following: 'We have assurance that within forty-eight hours every labor organization in this country will come to our rescue. * * * Whatever happens, do not give credence to rumors and newspaper reports,'—which said telegram defendants admit was sent, or caused to be sent, by the defendant Debs, as in said information alleged; but save as hereinbefore admitted, defendants allege that they had no knowledge or notice whatever of the sending of said telegrams, or of the contents thereof, until the filing of said information." "They deny that any other telegrams similar in form and character to those in said information set out were sent by the defendant Debs, or any of the defendants, with the knowledge, authority, or approval of any of said other defendants, at any time after the service of said writ of injunction upon said defendants, and deny that any employees of any of the railway companies named in said information were induced by reason of any telegram sent, or caused to be sent, by the defendants, or any of them, by threats, intimidation, force, or violence, to leave the service of said railway companies, or that the transportation of the United States mails and interstate commerce was thereby in any way hindered, delayed, or prevented." "The defendants admit that upon some of said lines of railway there was exercised, upon the part of some persons to the defendants unknown, violence against persons and property. They deny that they, or any of them, have any knowledge or information sufficient to form a belief as to the commission of the specific acts of violence in said information set forth, or any thereof; and, upon information and belief, they deny that any member of said American Rail- [732] way Union in any manner participated in said acts of violence or any of them." "They deny that, in violation of the order of the court, they daily and continuously or at all issued any orders or directions for the employees of said railway companies, or any of them, to leave such service in a body, as alleged in said information or otherwise. They deny that at said time, or at any time, they knew that violence and unlawful conduct necessarily followed from strikes of the kind mentioned in said information, and deny that such is the fact, but, on the contrary, allege that, so far as said American Railway Union, or the members thereof, are concerned, said strike, and all strikes of a similar character, contemplate nothing more than the quiet, peaceable, and lawful cessation of work by such members when and for such periods as they shall for themselves determine. Defendants expressly deny that they, or any one of them, did at the time mentioned in said information, or at any other time, order, direct, counsel, advise, recommend, or approve the acts of violence in said information set forth, or any of them, or any violence or unlawful acts of any kind or character, but, on the contrary, allege that they did at all said times counsel and advise all members of the said American Railway Union with whom they were in communication to at all times abstain from violence, threats, intimidation, and to at all times respect the law and the officers thereof." "They deny that the board of directors of said American Railway Union, or its officers, or these defendants, or either of them, at any time assumed the authority and power, or have now or ever have had any authority or power whatsoever, to order strikes and boycotts, or to discontinue the same." "They admit that on the 12th day of July, 1894, the communication set out in said information was addressed to the railway managers, and signed by the defendants, whose names are affixed thereto, but allege that so much of said communication as implies or assumes any right, power, or authority in said defendants, or either of them, to discontinue said strike, was unauthorized, and that said defendants had no other power or authority in said matter than to recommend to the members of the said American Railway

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Union the adoption of the proposals therein stated." "Defendants admit the sending of the communication to the Panhandle yard men set forth in said information, but deny that in and by said communication they exercised, or assumed to exercise, any power or authority over said men, or any thereof, but that said communication was merely a request to said men to perform the acts therein stated." "They deny that they have any knowledge or information sufficient to form a belief as to whether the interview set forth in said information was in fact published in the Chicago Herald on July 15th, or at any other time. They deny that the defendant Debs, or any other defendants, caused said interview to be published, or uttered the statements therein contained, or any of them, but allege that said interview is wholly false, forged, and fictitious." "The defendants deny that they, or either of them, have in any way or manner interfered with, hindered, obstructed, or stopped any of the business of the railroads mentioned in said injunction, or either of them, as common carriers of passengers and freight between or among the states of the United States; or that they, or either of them, have in any manner interfered with, hindered, obstructed, or stopped any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states; or that they, or either of them, have in any manner interfered with, hindered, or stopped any train carrying the mail; or that they, or either of them, have in any manner interfered with, hindered, obstructed, or stopped any engine, car, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; or that they, or either of them, have in any manner interfered with, injured, or destroyed any of the property of any of said railroads engaged in or for the purpose of or in connection with interstate commerce, or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states; or that they, or either of them, have entered upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger, or freight trains, [733] engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce, or the transportation of passengers or property between or among the states; or that they, or either of them, have injured or destroyed any part of the tracks, roadbed, or road, or permanent structures of said railroads; or that they, or either of them, have injured, destroyed, or in any way interfered with any of the signals or switches of any of said railroads; or that they, or either of them, have displaced or extinguished any of the signals of any of the said railroads; or that they, or either of them, have spiked, locked, or in any manner fastened any of the switches of said railroads; or that they, or either of them, have uncoupled or in any way hampered or obstructed the control of any of said railroads or any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; or that they, or either of them, have compelled or induced, or attempted to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employees of any of said railroads to refuse or fail to perform any of their duties as employees of any of said railroads in connection with the interstate business or commerce of such railroads, or the carriage of the United States mail by such railroads, or the

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transportation of passengers or property between or among the states; or that they, or either of them, have compelled or induced, or attempted to compel or induce, by threats, intimidation, force, or violence, any of the employes of said railroads who are employed by such railroads and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States or doing interstate business, or in the transportation of passengers and freight between or among the states, to leave the service of such railroads; or that they, or either of them, have prevented any person whatever, by threats, intimidation, force, or violence, from entering the service of any of said railroads, and doing the work thereof in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states; or that they, or either of them, have done any act whatever in furtherance of any conspiracy or combination to restrain either of the said railroad companies or receivers in the free and unobstructed control and handling of interstate commerce over the lines of said railroad, and of transportation of persons and freight between and among the states; or that they, or either of them, ordered, directed, aided, assisted, or abetted in any manner whatever any person or persons to commit any or either of the acts aforesaid." "And the said defendants each for himself does plead to the said information that he is not guilty of any or either or all of the acts therein charged, or of any contempt of the orders of this court in the premises." "Defendants further allege that, after the service of said injunction upon them, they forthwith consulted competent counsel, learned in the law, and duly authorized and licensed to practice as attorney and counselor at law in the courts of the United States, and fully and fairly stated to him all the facts in the premises, and exhibited to him the order of the court made herein, and were advised by him as to what they might rightfully and lawfully do in the premises without violation of the order of the court or contempt of its authority; and that, they have since that time in all things proceeded, in their acts and conduct in regard to said strike and the persons engaged therein, in strict accordance with the advice of the said attorney so by them consulted. And the said defendants each for himself denies that he intended in any way to violate the injunction of this court, or to act in defiance or contempt of its authority in any respect. And the defendants further allege that by the organization of said American Railway Union, and by custom and usage uniformly and universally prevailing therein, at all the times in said information mentioned, which said custom and usage had the force and effect of, and stood in lieu of, by-laws of said American Railway Union, and by the general and unanimous will, consent, delegation, and acquiescence of all the members thereof, the officers and directors of said American Railway [734] Union, including these defendants, were at all the times in said information mentioned fully authorized, empowered, and directed to act as the agents of the members of said American Railway Union, and all of them, and all the separate unions thereof, whenever a strike or cessation of labor had been determined upon by said members of said union, or either of them, to inform and advise them concerning the condition and prospects thereof, and the condition and attitude of the several local unions engaged therein, and to advise and counsel them as to peaceful and lawful methods pursued by them to secure the redress of grievances complained of by them, and to treat and negotiate for them, subject to their ultimate ratification, with their employers for a settlement or adjustment of the causes leading to said strike, but had no right, power, or authority to in any way order or command any of said members in respect to any of said matters; and they allege

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that each and every act and thing done by them in reference to the strike in said information mentioned, or any of the persons engaged therein, was done in pursuance of such power and authority, and not otherwise. Wherefore, defendants pray that they may be adjudged not guilty of contempt; that the complainant's information be as to them dismissed, and they go hence without delay."

On July 25th the defendants filed a supplemental answer, denying "each and every allegation in said information contained, and each and every part thereof, save as the same are in their former answer expressly admitted or denied."

SECOND INFORMATION.

On the 1st day of August, 1894, a second information was presented in the cause, directed against James Hogan, William E. Burns, R. M. Goodwin, J. F. McVean, and M. J. Elliott. This information recites the filing of the original information, and the arrest of the defendants therein named upon the writ of attachment issued, and, alleging that the persons named were directors of the American Railway Union, reiterates the original averments and charges further: That on or about June 27, 1894, the officers and directors of the American Railway Union entered into a combination and conspiracy to bring about, by their orders, their advice, their counsel and persuasion, the strike and boycott more particularly described in said original bill of complaint; and that the better to conduct the business of said combination and conspiracy, and to more effectually manage the vast number of persons being members of said American Railway Union and others engaged in such combination and conspiracy, said officers and board of directors divided up the work of such management and direction among committees. That, under said arrangement and action of the board of directors, Debs and Howard would have, and thereafter they did have, charge of the work of publication and publicity; Rogers, Burns, and Goodwin had charge of all meetings and speakers, and the organization of lodges; and Hogan, either alone or with others of the directors, had charge of correspondence, and of the sending and receiving of letters and telegrams, or a considerable portion thereof. That each of the directors is responsible for every act done or omitted to be done by all or any of the other directors or officers or servants or agents in connection with the business of said strike or boycott. That, by arrangement or agreement of the board of directors, Rogers was to have charge of editing and the publishing of a certain newspaper called the "Railway Times," which was to be the official organ of the American Railway Union. That the paper was published in the city of Chicago by Rogers; and that in and through said newspaper the directors counseled, encouraged, and directed the members of the American Railway Union and all other railway employes, including the employes of the railway companies named in the bill of complaint, to disregard said order and writ of injunction, and the orders and directions of the officers operating said railroads, respectively. That said officers and directors, in pursuance of said conspiracy, did, on different dates in the months of June and July, 1894, cause to be sent each and all of the telegrams set out in the original information, to which the name of said Debs is attached, and also the several following telegrams, which are set out by copy; also many hundred other telegrams of like purport, and with similar intent and purport, copies of which, sent to different [735] places in the different states, over the signature of E. V. Debs, between the dates of June 27 and July 29, 1894, are set out. That said defendants continued to send out, by telegraph, orders, directions, and advice to the meeting of

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the various unions along the lines of railroads, directing and counseling them to continue the strike and the various acts of interference with the operation of said roads; and that all of the directors have persisted in violation of the injunction, and in their defiance of the order of this court.

ANSWER OF HOGAN AND OTHERS.

The defendants so brought into the case filed a joint answer, not essentially different from the answer of the original defendants, except that it contains the following averments:

They deny that on the 26th day of June, A. D. 1894, or at any other time, the American Railway Union, through its officers and directors, or otherwise, ordered or directed all or any of the employes of the railroad companies named in the bill, or either of them, to enter upon any strike for the purpose in the information alleged, or otherwise. They admit that at divers times during the month of June, and before the issuing of the injunction, they did counsel and advise certain of the employes of the railway companies named in the bill, all of the employes so counseled and advised being members of the American Railway Union, to quietly, peaceably, and lawfully quit the service of their employers, and allege that, in giving such advice and counsel, they acted for the employes, and by their authority conferred upon them or each of them, as herein-after set forth. And they deny that their purpose in giving such advice and counsel was to cause any strike with the sole purpose, or with the purpose at all, of compelling the railway companies, or either of them, to unite with the American Railway Union, or with any person or persons, in any illegal boycott, or in any boycott whatsoever, and deny that the American Railway Union, its officers, directors, and members, or these defendants, or either of them, did on the day mentioned, or at any time, for any purpose or in fact, enter into any unlawful conspiracy or combination whatever to tie up or paralyze any of the business of any of said railroads or the carrying of the mails or interstate commerce until such company should consent to enter into any conspiracy or refuse to haul the cars of said Pullman Sleeping-Car Company, whether as alleged or otherwise, or that said combination was to be persisted in as alleged or otherwise. On the contrary thereof, the defendants allege that they were at all said times informed, and in good faith verily believed, that the railroad companies named in the bill, and all of them, had formed or organized and were members of a certain unlawful conspiracy and combination among and between themselves to reduce the wages and compensation of their employes upon said roads, and each of them, including the members of the American Railway Union thereon, and all of them; and that, pursuant to that conspiracy and combination, the railroad companies proposed and intended to make reduction in the wages of employes, including the members of the American Railway Union, upon each of the lines of railroad, separately and successively, they, the railroad companies, uniting their powers, property, and influence to prevent the employes, including the members of the American Railway Union, upon each of the lines whereon the wages were to be successively reduced, from obtaining redress against the action of the railroad companies in pursuance of such unlawful conspiracy, and proposed and intended, by their combined and united action, to overcome successively and in detail any lawful and peaceable resistance that the employes, or any of them, might make to the reduction of their compensation. And, upon information and belief, the defendants allege that such conspiracy was in fact

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formed at said time with the intents and for the purposes hereinbefore set forth.

"It is further alleged that at all times they were informed and did in good faith verily believe that the Pullman Palace-Car Company, a corporation organized under the laws of the state of Illinois, and engaged in the business of constructing passenger and other cars upon the lines of said railroads (which said Pullman Palace-Car Company had various contract relations with said railroad companies, and each of them, for the use of its [736] said cars), was a member of and party to said conspiracy, and all the intents and purposes thereof; and, upon information and belief, defendants allege that such was the fact in regard thereto." They allege that very many of the employes of the Pullman Palace-Car Company were members of the said American Railway Union at the time in the information mentioned, and for some months prior thereto had been such members. They deny that they, or either of them, knew, or could have known, that any such acts were certain or almost certain or probable or reasonably to be expected to follow from such strike or cessation of labor, or that the same were in any manner due to or occasioned by or resulted naturally or otherwise from the orders, directions, counsel, or advice or acts, or either thereof, of the officers and directors of said American Railway Union, or either of them, or these defendants.

They allege that obstructions of the business of the railroad companies, or either of them, by the so-called "strike," was occasioned solely by the free, voluntary, and peaceable action of the employes of said railway companies in quitting the service thereof, for the purpose of protecting themselves and their rights and interests, and for their own purposes, and to secure their own ends, without any orders, directions, control, counsel, or assistance from these defendants, or either of them. And they allege, on information and belief, that the railway companies, and each of them, in pursuance of said conspiracy, and for the purpose of maintaining the said Pullman Palace-Car Company in its dispute with its said employes, and for the purpose of overcoming the resistance of their employes to the acts threatened and contemplated by them, as aforesaid, and to bring down upon said employes the penalties of law, and endeavor to invoke against the employes the action of the courts of the United States, did, by their efforts, contribute largely to the hindering and impeding of said transportation of mails and interstate commerce; and that said railway companies could, had they been so disposed, have fully performed their duties, under the laws of the United States, in that regard. They allege that they and each of them have uniformly and consistently and at all times in said petition mentioned, by speech and writing, advised a great number of said American Railway Union members, and all persons acting with them, to use only peaceable and lawful methods, and to refrain from any force or violence or unlawful conduct whatever, and from any violation of the laws of the United States or any of the states thereof, or any order of the courts to them directed.

Defendants admit the proceedings in the nature of contempt had in this court against Eugene V. Debs, George W. Howard, Sylvester Kellher, and L. W. Rogers, and admit that in said information against such persons it was charged that they had caused to be sent certain telegrams, and that, in their answers, they deny the sending of all said telegrams except a certain one dated July 6, 1894. They deny that any or all of the telegrams set out in said information were sent, or caused to be sent, by the officers and directors of said American Railway Union except as hereinafter admitted, or that any other tele-

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grams in relation to said strike were sent except as hereinafter admitted, and deny that any telegrams were sent by said officers and directors, or either of them, in pursuance of any combination or conspiracy, or to accomplish the purposes thereof. They deny that there was any specific division among the officers and directors of the American Railway Union of the business and duties of the organization or the labors occasioned by their relation to the cessation of labor or strike hereinbefore mentioned, but allege that, in respect to said work, each of said officers and directors performed generally the work and things coming under his notice, and seeming to him fit and proper to be done. They deny that said work was divided in the manner alleged in said information or otherwise, or any of said officers or directors had charge of the alleged divisions of work stated in said information, or any such divisions or departments of work. They allege that, in the actual practice of work, some tacit and occasional division actually occurred, but that the same was in nowise formally or generally observed; and that each and every one of said officers and directors acted for himself, upon his own judgment and responsibility, except where, by conference upon a given subject, a course was determined upon; and that each one of said officers and directors was responsible solely for the specific acts by him done, and not otherwise. They allege that each and all the acts done by said officers and directors and by these defendants, and each of them, were so done in pursuance of the authority conferred upon them by the members of said American Railway Union as the same is hereinbefore alleged, and not otherwise. Defendants deny that, in pursuance of any arrangement or agreement or otherwise, the defendant Rogers was to have charge of the editing or publishing of the so-called "Railway Times"; or that said Rogers caused said paper to be published in the said city of Chicago, as alleged, or otherwise; or that, by said newspaper or otherwise, said directors, or either of them, have counseled, encouraged, directed, or advised the members of said American Railway Union, or any other person or persons, or class of persons, to disregard the order and writ of injunction of this court, or any order or writ of any court, or to disregard the orders and directions of the persons operating any railway at any time. They admit and allege that the telegrams set forth in said information were sent by the defendant James Hogan; and allege that the same were sent by him for the purpose and with the intent of peacefully and lawfully counseling and advising men who had, by reason of the grievances done or threatened to them, and by reason of the unlawful conspiracy of said railway companies and said Pullman Palace-Car Company, hereinbefore set forth, peaceably, lawfully, and voluntarily quit the service of said railway companies; and allege that said telegrams, and all of them, had no other relation to or effect upon said strike, or any of the matters incident to or growing out of the same, than might well result from the lawful and peaceful counsel to the members of the said American Railway Union as to such of their own personal rights and interests as were involved in said controversy. The said defendants each for himself denies that he intended in any way, in any act or thing by him done, to violate the injunction of this court, or to act in defiance or contempt of its authority. And the said defendants each for himself does plead to said information that he is not guilty of any of either or all of the acts therein charged, or of any contempt of the authority of this court in the premises.

The petition of the receivers shows their appointment in December, 1893; that, by the order appointing them, all persons were forbidden to interfere with their possession and management; that the road

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extends through a number of states, and is an important line of commerce, using Pullman sleepers under contract; that on the 22d of June, 1894, the defendants, being officers of the American Railway Union, entered into a conspiracy to boycott Pullman cars, and, upon the refusal of the receivers to submit to their dictation, proceeded to employ substantially the same modes of interference as are charged in the information presented in the other case in the name of the United States.

In addition to the order made when the receivers were appointed, it is also shown that on June 29, 1894, this court issued an additional order, for the protection of the receivers in the management of the property, whereby "all persons were enjoined and restrained from interfering in any manner with trains, cars, switches, or other property, and from interfering, by intimidation, threats, violence, or in any other manner, with the employes of said receivers in the performance of their duties"; that this order was published in the evening papers of Chicago on June 29th, and in morning papers of the 30th; and that on July 2d an injunction was issued, upon the petition of the United States, enjoining the defendants, and others in conspiracy with them, from interfering with the railroads named, including the Atchison, Topeka & Santa Fé; that, notwithstanding these orders and injunctions, the defendants persisted in "their illegal acts and doings, without change or abatement," etc.

The defendants Debs, Howard, Kellher, and Rogers, who only, in the first instance, were named in this information, filed an answer, differing in no respect which need be pointed out from their answer in the other case. The names of Hogan, Burns, Goodwin, McVean, and Elliott were afterwards [738] inserted in the information, by leave of court; and it was agreed that they should have the benefit of the answer already filed by Debs and others as if it were their own. The two cases were heard at the same time, upon an agreement that they should be considered to be separate hearings, but that any evidence introduced in either case might be considered in the other, if relevant.

Edwin Walker and *T. E. Milchrist*, United States District Attorney, for the United States.

E. A. Bancroft and *John S. Miller*, for receivers.

W. W. Erwin, *Clarence S. Darrow*, and *S. S. Gregory*, for defendants.

The attorneys for the receivers presented the following propositions and citations of authorities:

"Any interference with property in the custody of the court is a contempt. *Richards v. People*, 81 Ill. 551; *Noe v. Gibson*, 7 Paige. 513; *In re Swoles*, 41 Fed. 752. Such, also, is any act of interference by force or threats with employes in charge of such property. *Secor v. Toledo, P. & W. R. Co.*, 7 Biss. 513, Fed. Cas. No. 12,605; *King v. Ohio & M. R. Co.*, 7 Biss. 529, Fed. Cas. No. 7,800; *In re Wabash R. Co.*, 24 Fed. 217; *In re Higgins*, 27 Fed. 443; *In re Doolittle*, 23 Fed. 544; *U. S. v. Kane*, Id. 748. See, also, *In re Chiles*, 22 Wall. 157; *McCauley v. Sewing Mach. Co.*, 9 Fed. 698; *Sherry v. Perkins*, 147 Mass. 219, 17 N. E. 307. Where the court has jurisdiction of the person, a disobedience of the court's order is contempt, though committed in another district.

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McOsway v. Sewing Mach. Co., *supra*; *Williams v. Hintermeister*, 26 Fed. 889, 890. Aiding, advising, or persuading another to do a forbidden act, or even permitting another whose action can be controlled to do the forbidden act, is contempt. *Societe Anonyme de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fecamp v. Western Distilling Co.*, 42 Fed. 96; *Blood v. Martin*, 21 Ga. 127; *Neale v. Osborne*, 14 How. Pr. 81; *Wheeler v. Gilsey*, 35 How. Pr. 139; *Stimpson v. Putnam*, 41 Vt. 238; *Poertner v. Russell*, 33 Wis. 193."

Woods, Circuit Judge, after making the foregoing statement:

If the case presented were itself of less moment, the very great importance of some of the questions involved could not be overlooked. To the study of them I have devoted more time than could well be spared from other duties. It is due to counsel to say that the labor of the court, protracted and painstaking as it has been, has been greatly relieved by the contributions of learning and research which they brought to the discussion. While the principles considered are not new, in the question of the validity of the injunction which the defendants are charged with violating there are involved inquiries which in some respects go beyond the lines of established or unquestioned precedent.

A preliminary question in the case was whether or not, upon the filing of their answers, the defendants were entitled to be discharged without an inquiry into the facts. The authorities seem to be agreed, and accordingly the court ruled, District Judge Grosscup participating in the decision, that, in a proceeding for contempt in equity, a sworn answer, however full and unequivocal, is not conclusive. *King v. The Vaughan*, 2 Doug. 516; *Underwood's Case*, 2 Humph. 48, 49; *Rutherford v. Metcalf*, 5 Hayw. (Tenn.) 58, 61, 62; *Magenis v. Parkhurst*, 4 N. J. Eq. 433, 434; *State v. Harper's Ferry Boat Co.*, 16 W. Va. 864, 873; *Crook v. People*, 16 Ill. 534, 537; *Buck [739] v. Buck*, 60 Ill. 105, 106; *Welch v. People*, 30 Ill. App. 399, 409; *Yates' Case* (Kent, Ch. J.) 4 Johns. 317, 373; *McCredie v. Senior*, 4 Paige, 378, 381, 382; *Bank v. Schermerhorn*, 9 Paige, 372, 375; *U. S. v. Anon.*, 21 Fed. 761, 768.

The objection raised by demurrer that the injunction was illegal and void was overruled at the time of presentation, but with leave for further argument at the final hearing upon

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the evidence. A great body of evidence, consisting of the testimony of witnesses, telegrams, and other documents, has been adduced to show the guilt of the accused. The defendants, claiming the constitutional privilege against self-incrimination, refused to testify at the instance of the prosecution, and have offered no evidence in their own behalf, excepting parts of certain documents which were allowed to be read in connection with other parts offered by the prosecution. Besides denying that any violation of the injunction has been proved against them, the defendants now reassert and insist that the injunction is invalid, on the two grounds that the court had no jurisdiction to hear and determine the case in which the injunction was ordered, and that, though possessed of such jurisdiction, the court lacked organic power to make the particular order in question. Reference is made to *Ex parte Fisk*, 118 U. S. 713, 718, 719, 5 Sup. Ct. 724; *In re Sawyer*, 124 U. S. 200, 220-222, 8 Sup. Ct. 482; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Windsor v. McVeigh*, 98 U. S. 274, 282, 283; *Kerfoot v. People*, 51 Ill. App. 409. If the injunction was, for any reason, totally invalid, no violation or disregard of it could constitute a punishable contempt; but if the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ. *Elliott v. Peirsol*, 1 Pet. 340; *Ex parte Watkins*, 3 Pet. 193; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263. The considerations of public policy on which this rule rests are too plain and well understood to need restatement.

Was the case one of which the court had jurisdiction? No question is made, or could be made in a proceeding for contempt, of the sufficiency of the petition for the injunction in respect to matters of form and averment merely. In *Coy's Case*, *supra*, the court said:

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses,—as forgery of its bonds, or perjury in its courts,—its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

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The question here, therefore, is whether the case presented by the petition was of a class which in a federal court admits of the remedy by injunction.

Without going into the details of averment, the charge made against the defendants was that they were engaged in a conspiracy to hinder and interrupt interstate commerce and the carriage of the mails upon the railroads centering in Chicago, by means and in a manner to constitute, within the recognized definitions, a public nuisance. A nuisance is "anything that unlawfully work- [740] eth hurt, inconvenience or damage." 3 Bl. Comm. 216. "A public nuisance is such an inconvenience or troublesome offense as annoys the whole community in general, and not merely some particular person." Id. 166. As defined in Wood on Nuisances (page 38), "a public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public." A form of public nuisance of which cognizance has been taken by the courts of equity in England and in this country is called "purpresture," which is defined to be "an encroachment upon lands, or rights and easements incident thereto, belonging to the public, and to which the public have a right of access or of enjoyment, and encroachment upon navigable streams." "The remedy for a purpresture, simply, is by information in equity at the suit of the attorney general or other proper officer." Wood, Nuis. pp. 107, 117; *People v. Vanderbilt*, 28 N. Y. 396; *New Orleans v. U. S.*, 10 Pet. 662; *Attorney General v. Forbes*, 2 Mylne & C. 123.

In Kerr on Injunctions (page 395) it is said:

"There is a wide difference between a purpresture and a nuisance. Although they may coexist, either may exist without the other. If the act complained of be a purpresture, it may be restrained at the suit of the attorney general, whether it be a nuisance or not. Being an encroachment on the soil of the sovereign, like trespass on the soil of an individual, it will support an action irrespective of any damage which may accrue. But, to constitute a public nuisance, damage to the public right of navigation or other public right must be shown to exist. If the act complained of be a mere purpresture, without being at the same time a nuisance, the court

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will usually direct an inquiry to be made whether it will be more beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrested; but, if the purpresture be also a public nuisance, this cannot be done, for the crown cannot sanction a public nuisance."

Accordingly, it is contended, and numerous decisions and texts are cited to show, that "equity had jurisdiction to restrain public nuisances upon bill or information filed by the attorney general on behalf of the people." High, Inj. §§ 745, 759, 764, 1570; Pom. Eq. Jur. § 1349; Wood, Nuis. p. 124; Story, Eq. Jur. §§ 921-924; 1 Daniell, Ch. Pr. 7, 8; Mitf. Eq. Pl. 104, 117, 196; *Attorney General v. Johnson*, 2 Wils. Ch. 87; *Attorney General v. Forbes*, 2 Mylne & C. 123; *Attorney General v. Terry*, 9 Ch. App. 423; *Attorney General v. Birmingham*, 4 Kay & J. 528; *People v. Miner*, 2 Lans. 396; *People v. Ferry Co.*, 68 N. Y. 71; *Davis v. Mayor*, etc., 14 N. Y., 526; *People v. Vanderbilt*, 28 N. Y. 396; *Id.*, 26 N. Y. 287; *Attorney General v. Hunter*, 1 Dev. Eq. 12. I quote passages, some of which, besides bearing upon the principal question of jurisdiction, will be found to be determinative of other questions which have come under discussion.

Story says:

Section 921: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date. * * * The jurisdiction is applicable, not only to 'public nuisances,' strictly so called, but also to purprestures upon public rights and property. * * * In its common acceptation it [purpresture] is now understood to mean an encroachment upon the [741] king, either upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as open highways, public rivers, forts, streets, etc., and other public accommodations." *City of New Orleans v. U. S.*, 10 Pet. 662; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 554; *Attorney General v. Cohoes Bridge Co.*, 6 Paige, 133.

Section 923: "In cases of 'public nuisances,' properly so called, an indictment lies to abate them, and to punish the offenders; but an information also lies in equity to redress the grievance by way of injunction. The instances of the interposition of the court, however, are, it is said, rare, and principally confined to informations seeking preventive relief. Thus, informations in equity have been maintained against a public nuisance by stopping a highway."

Section 924: "The ground of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations. In the first place, they can interpose, where the courts of law cannot, to restrain and prevent such nuisances which are threatened or are in progress,

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as well as to abate those already existing. In the next place, by a perpetual injunction, the remedy is made complete through all future time."

So Pomeroy, in section 1349, says:

"A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general, in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country." *Attorney General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Rochester v. Erickson*, 46 Barb. 92; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518.

Wood (volume 1, p. 124) says:

"While, at the close of the Revolution, the people of each state, in their sovereign capacity, acquired the absolute right to all navigable waters and the soil under them, yet where the state has permitted a use of navigable waters connecting the two states that interferes with navigation, the general government, under the power given it by the constitution to regulate commerce between the states, may exercise jurisdiction over the waters, and procure an abatement of such obstructions." *Insurance Co. v. Cuiertius*, 6 McLean, 209, Fed. Cas. No. 3,045.

High says:

Section 1554: "When the right involved is purely of a public nature, and the grievance which it is sought to enjoin is one which affects the public at large, the proceeding is usually instituted, both in England and in this country, by the attorney general in behalf of the people, sometimes proceeding in his own name or that of the people absolutely, and sometimes upon the relation of a citizen; and in actions to enjoin the erection or continuance of public nuisances this course is generally pursued." *State v. Dayton & S. B. R. Co.*, 36 Ohio St. 434; *People v. Vanderbilt*, 28 N. Y. 396.

Section 764: "When proceedings are had to enjoin a public nuisance, such as the pollution of a river by a board of municipal officers in violation of an act of parliament under which they are acting, a distinction is drawn, as to the necessity of proving an actual injury, between the case of an information filed by the attorney general in behalf of the public and a bill filed by private citizens in their own behalf; and in the former case it is held to be unnecessary for the attorney general to establish any actual injury, the statute having prohibited the act complained of."

Section 745: "It is, however, to be observed that the fact that the commission of the threatened act, which it is sought to enjoin as a nuisance, may be punished criminally as such, will not prevent the exercise of the restraining power of equity." *People v. St. Louis*, 5 Gilman, 351; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *Gilbert v. Canal, etc., Co.*, 8 N. J. Eq. 495.

[742] To the same effect, in 2 Daniell, Ch. Pl. & Pr. (4th Ed.) p. 1636, it is said: "In cases of 'public nuisance,' properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in equity to stop the mischief, and to restrain the continuance of

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it"; and among the cases cited in support of the text are *Attorney General v. Nichol*, 16 Ves. 338; *Attorney General v. Forbes*, 2 Mylne & C. 123; *Attorney General v. Cambridge Consumers' Gas Co.*, L. R. 6 Eq. 282; *Bunnell's Appeal*, 69 Pa. St. 59. See, also, *Craig v. People*, 47 Ill. 487; *Attorney General v. Railroad Companies*, 35 Wis. 527; *Attorney General v. City of Eau Claire*, 37 Wis. 400.

The supreme court of the United States has spoken on the subject. In the case of *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 98, where an injunction was sought against obstructing the navigation of the Potomac river, the court said:

"Besides this remedy at law, it is now settled that a court of equity may take jurisdiction, in cases of public nuisance, by an information filed by the attorney general. This jurisdiction seems to have been acted on with caution and hesitancy. Thus, it is said by the chancellor, in 18 Ves. 217, that the instances of the interposition of the court were confined and rare. He referred, as to the principal authority on the subject, to what had been done in the court of exchequer upon the discussion of the right of the attorney general, by some species of information, to seek, on the equitable side of the court, relief as to nuisance, and preventive relief. Chancellor Kent, in *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 382, remarks that the equity jurisdiction in cases of public nuisance, in the only cases in which it had been exercised (that is, in cases of encroachment on the king's soil), had lain dormant for a century and a half (that is, from Charles I. down to the year 1795). Yet the jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law. While, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances where it is exercised are rare, yet it may be exercised in those cases in which there is eminent danger of irreparable mischief before the tardiness of the law can reach it."

See, also, the opinion in *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, where a bridge across the Ohio river was held to be a public nuisance, and ordered abated, at the suit of the state of Pennsylvania.

But while this jurisdiction of the English courts of chancery and of the equity courts of the several states of the Union is not understood to be disputed by counsel for the defendants, they do insist that, in the absence of legislation by congress conferring the authority, the federal courts can do nothing for the protection of the highways of interstate commerce, whether upon land or water. They cite the following language from the opinion in *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct.

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732, in which *Pennsylvania v. Wheeling, etc., Bridge Co.*, it may be observed, is declared to be "a peculiar case":

"Now, wharves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property,—real estate; and they are, primarily at least, subject to the local state laws. Congress has never yet interfered to supervise their administration; it has hitherto left this exclusively to the states. There is little doubt, however, that congress, if it [743] saw fit, in cases of prevailing abuses in the management of wharf property,—abuses materially interfering with the prosecution of commerce,—might interpose and make regulations to prevent such abuses. When it shall have done so it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted; but, until congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. It is congress, and not the judicial department, to which the constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject."

And from *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, the following:

"The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned; but, until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and, if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist, and none such exist except what are to be found on the statute book."

Accordingly, notwithstanding the provision, in the "Act for the admission of Oregon into the Union" that "all the navigable waters of said state shall be common highways and forever free," it was held in that case that the bridge which it was sought to remove was not an offense against the United States, in the absence of direct legislation bringing obstructions and nuisances in navigable streams within the scope of national law.

In reply to this position of the defense, reference is made to the "Act to regulate commerce," as amended by the act of March 2, 1889 (25 Stat. 855); and it is contended that by

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force of the provisions of that statute, passed in exercise of the power conferred on congress by the constitution "to regulate commerce among the several states," the national control has been extended over the channels and agencies of interstate commerce, including railways as well as navigable waters, and that out of this legislation, whatever had been the rule before, has arisen by necessary implication the jurisdiction of the federal courts, in accordance with the principles of equity, to protect that commerce against interference or obstruction. The right of the federal government to obtain the injunction is also asserted upon the ground of property right in the mails.

That the nation owns the mail bags is of course beyond dispute, and that it pays large sums annually for the carrying of the mails upon the railroads is well understood. In *Searight v. Stokes*, 3 How. 151, where the question was whether vehicles carrying the mails were "laden with the property of the United States," and therefore exempt from toll on the Cumberland road, in Pennsylvania, the supreme court said:

[744] "The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the sessions of congress, consists of communications to or from the officers of the executive department, or members of the legislature, on public service or in relation to matters of public concern."

It is said, on the contrary, to be easy "to show that, at common law, jurisdiction of the chancery on information of the attorney general to restrain a purpresture or nuisance rests on the idea that the king owns the land whereon it exists." It is doubtless true that, in the cases where the jurisdiction was invoked, the king was the owner of the land, because the land under navigable waters in England has always belonged to the crown; but the object of the suits has always been, not to vindicate the title to the land, which could have been done by the action of ejectment, but to prevent or remove obstructions to navigation, which required the prompt and efficient methods of equity; and it is not to be believed that if in England, as along the fresh-water rivers of this

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country, the title of lands under the water had belonged to the riparian owners, the same jurisdiction would not have been exercised for the protection of the public right of navigation. The public interest is concerned in the unobstructed use of the water, and it is sticking in the mud to say that the right to protect that use is dependent upon the ownership of the underlying soil. If, however, the jurisdiction in such cases must be held to rest upon some legal title or property right, which by fiction shall be deemed to be worthy of equitable protection, or to afford a basis of jurisdiction for protecting incidental rights, it would seem that the property which the government has been declared to have in the mails and its unquestioned ownership of mail bags might well be deemed sufficient for the purpose. Justice Brewer said in *U. S. v. W. U. Tel. Co.*, 50 Fed. 28, 42: "The dollar is not always the test of real interest. It may properly be sacrificed if anything of higher value be thereby attained."

"But," say counsel, "this whole subject is utterly foreign to the question in this case. * * * Waterways are not railways. They are free to all comers, and are not the subject of private ownership nor control, but only of municipal regulation by public authority. *Lake Front Case*, 146 U. S. 387, 13 Sup. Ct. 110. The control of the railway is primarily with the company that owns and operates it. These great interests are entirely able to cope with any interference with their property. If they be held, in a high sense, as trustees for the public, why should equity entertain a suit by the beneficiaries of this trust until the trustees have proved recreant? These companies own the land over which their lines run, or a right of way in perpetuity, and, though charged with public duties, are still private pecuniary corporations operated for gain. As to all local matters, viz. the speed of trains, stopping at crossings, elevation of tracks, and things of that character, they are subject to local or state regulation. This could not be were the power of congress exclusive as in the matter of interstate rates. *Wabash, etc., Ry. [745] Co. v. People of Illinois*, 118 U. S. 557, 7 Sup. Ct. 4." It is, of course, true that waterways are not railways; that the latter and the title to the land

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under them are owned and controlled, under legal limitations, by companies which operate them for gain; but so are the boats which ply the rivers and lakes of the country; and I see no reason in any of the suggestions advanced for saying that the courts may give to commerce on the rivers a protection which they may not extend to commerce on the railways. The railroad companies are clothed with the power of eminent domain, to enable them to acquire lands necessary for their purposes, because the proposed use is for the public benefit. To the extent of the share which the companies have in interstate commerce they hold their lands and rights of way for the benefit of the general public and subject to the national control. "For this purpose," to use the expression of the supreme court in *Gilman v. Philadelphia*, 3 Wall. 713, in respect of navigable waters, "they are the public property of the nation, and subject to all the requisite legislation of congress."

But while the reasons to justify, on the grounds considered, the issuing of the injunction for the purpose of protecting, against obstruction or interruption, either the mails alone or interstate commerce, of which the carrying of the mails is a part, are strong, and perhaps ought to be accepted as convincing, there seems to be no precedent for so holding, and the responsibility of making a precedent need not now be assumed.

While, however, the point is not decided, the authorities on the subject have been brought forward so fully because, in part, of their bearing upon the question now to be considered,—whether or not the injunction was authorized by the act of July 2, 1890. It was under that act that the order was asked and was granted; but it has been seriously questioned in this proceeding, as well as by an eminent judge and by lawyers elsewhere, whether the statute is by its terms applicable, or consistently with constitutional guaranties can be applied, to cases like this. It is admitted in one of the briefs for the defendants, and the authorities already quoted clearly demonstrate, "that were congress to declare that the United States might maintain a bill to enjoin the obstruction of interstate commerce on railroads engaged therein,

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where such obstructions amounted to what, on a public highway, would be a public nuisance, such legislation would be admissible." Such an act, not going beyond the scope of equity jurisdiction in England at the time when the federal constitution was adopted, it is plain would not be obnoxious to the objection that it was an invasion of the field of criminal law which involved interference with the right of trial by jury. The jurisdiction of the courts of equity, and by implication their right to punish for contempt, are established by the constitution, equally with the right of trial by jury; and so long as there is no attempt to extend jurisdiction over subjects not properly cognizable in equity, there can be no ground for the assertion that the right of jury trial has been taken away or impaired. The same act may constitute a contempt and a crime. But the contempt is one thing, the crime another; and the punishment for one is not a duplication of the punishment of the other. The contempt can be tried and punished only by the court, while the charge of crime can be tried only by a jury.

The first and fourth sections of the act of July 2, 1890 (26 Stat. 209), read as follows:

Section 1: "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4: "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the cause and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It is not contended that other sections bear materially upon the construction or interpretation of these, except the sixth, to which reference will be made further along. The position of the defendants in respect to this statute, as stated in one of

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the briefs, is that it "is directed at capital," "at dangers very generally supposed to result from vast aggregations of capital;" that "the evil aimed at is one of a contractual character, and not of force and violence." In another brief it is said more definitely:

"That, sections 1 and 6 being construed together, it is apparent that the statute is aimed at monopoly of trade or commerce by which trade should be engrossed, and in and by which property should be employed and secured, but that, even should this contention be denied, still the statute does not confer a right on the government to proceed under the direction of the attorney general to abate a public nuisance existing in a highway of interstate commerce, but generally, by section 4, to prevent and restrain, by injunction, violations of a penal statute. It is thought, therefore, that, as held by Judge Putnam in *U. S. v. Patterson*, 55 Fed. 605, this act is inapplicable; but, if it is, then it is unconstitutional as an attempt to enforce a penal statute in equity, and not a justifiable authority for a proceeding familiar to equity, and, under congressional authority, admissible in the federal courts in the name of the government."

The very elaborate arguments presented in support of these propositions are the same, in the main, as were made and reported at length in the case referred to (*U. S. v. Patterson*), and therefore need not be restated. Reference was made in that case, and has been made in this, to the debates in congress while the measure was under consideration in that body; and, though it is conceded that we cannot take the views or purposes expressed in debate as supplying the construction of statutes, it is said we may gather from the debates in congress, as from any other source, "the history of the evil which the legislation was intended to remedy." Doubtless, that is often [747] true; and in this instance it is perhaps apparent that the original measure, as proposed in the senate, "was directed wholly against trusts, and not at organizations of labor in any form." But it also appears that before the bill left the senate its title had been changed, and material additions made to the text; and it is worthy of note that a proviso to the effect that the act should not be construed to apply "to any arrangements, agreements or combinations made between laborers with a view of lessening hours of labor or of increasing their wages, nor to any arrangements, agreements or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horti-

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cultural products," was not adopted. Such an amendment, doubtless, was not necessary in order to exclude agreements and arrangements of the kind mentioned; but the offering of the proposition shows that the possible application of the statute to cases not in the nature of trusts or monopolies, and in which workmen or farmers should be concerned, was not overlooked. But it is more significant that, upon the introduction of the bill into the house, the chairman of the judiciary committee, as reported in the Congressional Record (volume 21, pt. 5, p. 4089), made the following statement:

"Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of trade or commerce, mentioned in the bill, will not be known until the courts have construed and interpreted this provision."

It is therefore the privilege and duty of the court, uncontrolled by considerations drawn from other sources, to find the meaning of the statute in the terms of its provisions, interpreted by the settled rules of construction. That the original design to suppress trusts and monopolies created by contract or combination in the form of trust, which of course would be of a "contractual character," was adhered to, is clear; but it is equally clear that a further and more comprehensive purpose came to be entertained, and was embodied in the final form of the enactment. Combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words "or otherwise." It may be that those words should be deemed to include only forms of like character,—that is to say, some form of contract as distinguished from tort; but, if that be so, it only emphasizes and makes imperative the inference, which otherwise it seems to me would be sufficiently clear, that the word "conspiracy" should be interpreted independently of the preceding words. It is hardly to be believed that the words "or otherwise" were used simply for the purpose of giving fuller scope to the antecedent words "contract" and "combination," and then "conspiracy" added merely for the same purpose. Construed literally, the terms used in the body of this act forbid all contracts or combinations in restraint of

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trade or commerce; but that construction is controlled by the title, which shows that only unlawful restraints were intended. But what constitutes an unlawful restraint is not defined; and, under the familiar rule that such federal enactments will be interpreted by the light of the common law, I have no doubt but that this [748] statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a "contractual character," should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. But to put any such limitation upon the word "conspiracy" is neither necessary, nor, as I think, permissible. To do so would deprive the word, as here used, of all significance. It is a word whose meaning is quite as well established in the law as the meaning of the phrase "in restraint of trade," when used—as commonly, if not universally, that phrase has been used—in reference to contracts. A conspiracy, to be sure, consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed; and, since it would be unnecessary, it would be illogical, to conclude that only conspiracies which are founded upon, or are intended to be accomplished by means of, contracts or combinations in restraint of trade, are within the purview of the act. It would be to make tautologous words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. A distinction has been suggested between the phrase "in restraint of trade" and the phrases "to injure trade" and "to restrain trade." Though perceptible, the distinction does not seem to me so significant that the use of one expression rather than the other should vary the interpretation of this statute. Any

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contract, combination, or conspiracy, to be "in restraint of trade," must involve the use of means of which the effect is "to injure" or "to restrain" trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination, or conspiracy to restrain or to injure trade. It would not, I suppose, be enough, in an indictment, to charge conspiracy in restraint of trade in the language of the statute, but it would be necessary, unless the proposed restraint be shown to be in itself unlawful, to allege the illegal means intended to be used in order to effect the restraint; and whether the means should be averred to have been used "in restraint of" or "to restrain" trade could hardly be important. There are many cases, doubtless, in which the rule that every word of a statute should be given effect is inapplicable, because, when synonymous words are used, the court is powerless to give them different meanings; but, when words of different significance are employed, the rule forbids that the scope of the statute be compressed within the limits of the narrower word. "Drinking house" and "tippling house" are necessarily one, and it was well held in *Reg. v. McCulley*, 2 Moody, Cr. Cas. 34, that "ram, ewe, sheep, and lamb" were all covered by the word "sheep"; but, if the words had been "ram, ewe, or sheep," it would have been a plain violation of the rule to reject [749] the comprehensive word "sheep," and say that lambs or wethers were not included. *Rice v. Railroad Co.*, 1 Black, 379; *Gelpcke v. City of Dubuque*, 1 Wall. 220; *Fau v. Marsteller*, 2 Cranch, 10; *Adams v. Woods*, Id. 337; *U. S. v. Coombs*, 12 Pet. 72; *Maillard v. Lawrence*, 16 How. 251; *Market Co. v. Hoffman*, 101 U. S. 115; *Thornley v. U. S.*, 113 U. S. 313, 5 Sup. Ct. 491. And it is no more legitimate here to reject the word "conspiracy," or, what is practically the same thing, strip it of its well-settled criminal significance by confining it within forms of contract or of combinations in the form of trusts. For like reasons I am unable to regard the word "commerce," in this statute, as synonymous with "trade," as used in the common-law phrase "restraint of trade." In its general sense, trade comprehends every species of exchange or dealing, but its chief use is "to denote the barter or purchase and

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sale of goods, wares, and merchandise, either by wholesale or retail," and so it is used in the phrase mentioned. But "commerce" is a broader term. It is the word in that clause of the constitution by which power is conferred on congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Const. U. S. art. 1, § 8. In a broader and more distinct exercise of that power than ever before asserted, congress passed the enactments of 1887 and 1888 known as the "Interstate Commerce Law." The present statute is another exercise of that constitutional power, and the word "commerce," as used in this statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the constitution. That meaning has often been defined by the supreme court. *Gibbons v. Ogden*, 9 Wheat. 195, 197; *Gilman v. Philadelphia*, 3 Wall. 713; *The Daniel Ball*, 10 Wall. 557; *The Case of the State Freight Tax*, 15 Wall. 232, 275; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Ex parte Siebold*, 100 U. S. 371, 395; *County of Mobile v. Kimball*, 102 U. S. 691; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 569, 7 Sup. Ct. 4; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657, 10 Sup. Ct. 965. I quote passages which will serve incidentally to dispose of a number of points raised in the course of the argument, without referring to them more directly:

"The power of congress," said Chief Justice Marshall, in *Gibbons v. Ogden*, in 1824, when railroads were unknown, "comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'"

In *Gilman v. Philadelphia* it is said:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, imposed by the states or otherwise. * * * It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In the case of *The Daniel Ball*, a steamer employed on

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Grand river between Grand Rapids and Grand Haven, Mich., Justice Field, speaking for the court, said :

[750] " So far as the steamer was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress."

In the *State Freight Tax Case*, Justice Strong said :

" Beyond all question, the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by a state was the thing desired. The power was given by the same words, and in the same clause, by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution (section 1067), Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only traffic, but intercourse and navigation; and in the *Passenger Cases*, 7 How. 416, it was said: 'Commerce consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another; or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this interchange of commodities is by land or by water. In either case, the bringing of the goods from the seller to the buyer is commerce."

In *Pensacola Tel. Co. v. W. U. Tel. Co.*, Mr. Chief Justice Waite, speaking for the court, after reciting the provisions of the constitution, says:

" The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the

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demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily hindered by state legislation."

In *County of Mobile v. Kimball*, in reference to the power of congress over the subject, it is said:

"That power is indeed without limitation. It authorizes congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety."

[751] In *Wabash, etc., Ry. Co. v. Illinois*, Justice Miller, in the course of an exhaustive discussion, says:

"It cannot be too strongly insisted upon that the right of continued transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution (*Cook v. Pennsylvania*, 97 U. S. 566, 574; *Brown v. Maryland*, 12 Wheat. 419, 446); and it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

Speaking by the same judge, in *Ex parte Siebold*, the court had said:

"We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to exercise its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the constitution itself show which is to yield: 'This constitution and all laws which shall be made in pursuance thereof * * * shall be the supreme law of the land.' * * * The government must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons."

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In *Cherokee Nation v. Southern Kan. Ry. Co.*, the court, speaking by Mr. Justice Harlan, says:

"Congress has power to regulate commerce, not only with foreign nations and among the several states, but with the Indian tribes. It is not necessary that an act of congress should express in words the purpose for which it was passed. The court will determine for itself whether the means employed by congress have any relation to the powers granted by the constitution. * * * The question is no longer an open one, whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation."

These definitions and expositions of the scope and law of interstate commerce, except the last, preceded the enactments by congress on the subject. It was therefore of commerce so defined, embracing all instrumentalities and subjects of transportation among the states, that congress, by that legislation, assumed the control; and I see no reason for thinking that as employed in the act of 1890, which is essentially supplemental of the other acts, the word was intended to be less comprehensive. It has been decided in a number of cases in the circuit courts, and in one instance by a circuit court of appeals, that this act cannot be applied to trusts or monopolies in the manufacture or production of articles of commerce. For instance, in *Greene's Case*, 52 Fed. [752] 104, Justice Jackson held that congress had not the constitutional power, and by this act had not attempted, to limit the right of a corporation, created by a state, in the acquisition, control, and disposition of property in the several states, even if carried to the extent necessary for the control of traffic in a species of property among the several states. To the same effect was the ruling in *U. S. v. Knight*, which was affirmed by the United States circuit court of appeals for the Third circuit. 60 Fed. 306; *Id.*, 60 Fed. 934, 9 C. C. A. 297. This case is pending on appeal in the supreme court.^a See, also, *Dueber Watch-Case Manuf'g Co. v. E. Howard Watch & Clock Co.*, 55 Fed. 851. If these decisions are right (a point upon which I express no opinion), it follows that the act in question has relation only to commodities, and possibly to persons, in the course of move-

^a Affirmed, 15 Sup. Ct. 249.

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ment among the states, and to the agencies or means of transportation; and if, as is contended, and as seems to have been decided in *U. S. v. Patterson, supra*, it covers only contracts, combinations, or conspiracies "intended to engross or monopolize the market," it is an act of very narrow scope. Why should it not be construed to embrace all conspiracies which shall be contrived with intent, or of which the necessary or probable effect shall be, to restrain, hinder, interrupt, or destroy interstate commerce?

The argument to the contrary, drawn from the sixth section of the act, is not controlling, nor, as it seems to me, even strongly persuasive. That section provides for the forfeiture of "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in this act, and being in the course of transportation from one state to another, or to a foreign country"; but it does not say nor imply that only cases, whether of contract or combination or conspiracy, in which property shall be found subject to forfeiture, shall be deemed to come within the scope of the act. The force of the section is the same, I think, as if it read: "If in any case there shall be found any property owned," etc., "it shall be forfeited," etc.; and so read it neither expresses nor implies any limitation of the provisions of other sections.

At this point is interposed the constitutional objection which, it is urged, forbids a construction that goes beyond trusts and monopolies to include conspiracies to employ force or violence in restraint of trade or commerce. The argument was employed and amplified in the *Patterson Case*, 55 Fed. 605, 629-632. It was contended there "that if two or more persons commit an act of murder, robbery, forgery, shop-breaking, store-burning, champerty, or maintenance, which in fact has a natural, though unintended, result of interference with interstate commerce, they are liable criminally for a conspiracy to interfere with interstate commerce, if the statute broadly covers conspiracy merely to interfere with it." This proposition is built on the assumption—which I believe is supported neither by authority nor reason—that co-conspirators are responsible as conspirators for the natural, though unintended, results of the commission or attempt by

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one of them to commit the particular offense [753] originally agreed upon or intended. It is a fundamental and essential principle of law, and of social order, that all engaged in the commission of a particular crime, whether as counselors, aiders, abettors, or otherwise, are individually responsible criminally for other offenses which result naturally from the commission or attempt to commit the crime intended; but as agreement and intent are of the essence of a conspiracy, a conspiracy to commit a particular offense can hardly be deemed to include another conspiracy to commit another offense, unless the latter was the necessary result of the commission or attempt to commit the crime intended, or to such a degree the probable result that it could itself be charged in the indictment to have been intended. But if it were possible, by a course of technical reasoning and refinement, to extend the law of conspiracy to all crimes known to the law where two or more persons are implicated, it would, as Judge Putnam held, not involve the constitutionality of this act, which is limited to the field of interstate commerce, where the power of congress is unrestricted and supreme.

The question here, however, is of the validity of the fourth, rather than of the first, section of the act. It is urged that the power given by that section "to prevent and restrain violations" of the act is an unwarranted invasion of the right of trial by jury, and in support of the proposition are cited *Puterbaugh v. Smith*, 131 Ill. 199, 23 N. E. 428; *Carleton v. Rugg*, 149 Mass. 550-557, 22 N. E. 55; *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641; *Eilenbecker v. Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Pearson v. Yewdall*, 95 U. S. 294; *Boyd v. U. S.*, 116 U. S. 616-634, 6 Sup. Ct. 524; *Counselman v. Hitchcock*, 142 U. S. 547-582, 12 Sup. Ct. 195.

Little need be added to what has already been said upon that subject. The same act may be a crime and a contempt of court. If an assault or murder be committed in the presence of a court, the offender will be punishable both for the crime and for the contempt, and so with any other act committed in violation both of a criminal statute and of an injunction or order of court. Within the proper subjects of equitable cognizance, as established when the constitution was adopted,

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it was competent for congress to vest the courts with the jurisdiction granted by this section, and to impose upon them the duty of its exercise in proper cases. Just as, in construing the first section of the act, its general words are limited by force of the title to unlawful restraint, and the words "in restraint of trade," in their connection with the words "contract" and "combination," are to be given their common-law significance, so the jurisdiction in equity, though given in broad and general terms, will be deemed to be limited so as not to extend to a case which is not of equitable cognizance. Indeed, if the sixth section of the act may legitimately be used in aid of the construction of the first section, the fourth section warrants, if it does not require, that the first section be restricted to cases in which, in accordance with established precedent, an injunction could issue,—a limitation which would not be essentially uncertain or of difficult application, [754] and which, if necessary to the upholding of the statute, might well be adopted.

That this case is one of equitable character is clear, and, as I understand, has not been questioned by counsel; their contention being that neither by this statute, nor upon general principles, is the case within the jurisdiction of a federal court. Excepting the case of *U. S. v. Patterson*, I know of no ruling inconsistent with the jurisdiction here exercised. The case of *U. S. v. Trans-Missouri Freight Ass'n*, 53 Fed. 440; *Id.*, 7 C. C. A. 15, 58 Fed. 58,—had reference to a contract between railroads, which was alleged to have been made in violation of the act, but was held to be not unlawful. In the case of *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994, the late Judge Billings, under this statute, granted an injunction upon facts which made the question of jurisdiction the same as it is here, and in respect to that question his ruling and opinion were distinctly approved by the circuit court of appeals for the Fifth circuit (6 C. C. A. 258, 57 Fed. 85). The court said:

"The appellants assign as error the overruling by the circuit court of each of the grounds of objection urged in that court against the granting of said injunction. These are well summarized, discussed, and disposed of in the very able opinions of the judge of the circuit court who passed the decree now sought to be reversed. The mat-

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tars of law presented to and considered by him were not well taken by the appellants (respondents below) and the circuit court's ruling to that effect was correct. The bill exhibited is clearly within the statute, and the pleadings of the respondents were not such as to require the refusal of the prayer for a temporary injunction."

See, also, the opinion of Judge Speer in *Waterhouse v. Comer*, 55 Fed. 149.

In the *Case of Phelan*, 62 Fed. 803, who was charged with contempt of the United States circuit court at Cincinnati, growing out of the strike of last summer, and involving facts essentially identical with the facts of this case, Judge Taft declared the combination to be "in the teeth of the act of July 2, 1890," and after quoting from the act, and referring to the rulings of other judges in accord with his own view, said:

"A different view has been taken by Judge Putnam in the case of *U. S. v. Patterson*, 55 Fed. 605; but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore, their combination was for an unlawful purpose, and is a conspiracy, within the statute cited."

In the recent case of *U. S. v. Elliott*, 64 Fed. 27, Judge Philips declares similar views.

The facts of this case suggest illustrations of the impropriety as well as inconsistency of putting upon the statute the restrictive construction proposed. If, for example, the manufacturers of other sleeping cars, in their own interest, should enlist the brakemen and switchmen or other employes of the railroads, either individually or in associated bodies, in a conspiracy to prevent or restrain the use of Pullman sleepers, by refusing to move them, by secretly uncoupling, or by other elusive means, the monopolistic character of [755] the conspiracy would be so evident that, even on the theory that the statute is aimed at contracts or combinations intended to engross or monopolize the market, it would be agreed that the offense ought to be punishable. But in such a case if the officers or agents of the car companies, who might or might not be capitalists, would be individually responsible for violating the statute, upon what principle could the brakeman or switchman be exempt? Can workingmen, or, if you will, poor men, acting by themselves, upon

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their own motion and for their own purposes, whether avowed or secret, do things forbidden by the statute without criminal responsibility, and yet be criminally responsible for the same things done at the instance and to promote the purposes of others? Or will it be said that under this statute one who is not a capitalist may, without criminality, assist capitalists in the doing of things which on their part are criminal? If that be so, then, if a capitalist and one who is not a capitalist join in doing things forbidden by this statute, neither can be punished, because one alone cannot be guilty of conspiracy. The persistent effort of the defendants, as the proof shows, was to force the railroad companies—the largest capitalists of the country—to co-operate, or at least to acquiesce, in a scheme to stop the use of Pullman sleepers; and for a time they had the agreement of a manager and other officers of one road to quit the use of the obnoxious cars, and perhaps a qualified submission of the officers of another road or two to the same dictation: Does the guilt or innocence of the defendants of the charge of conspiracy, under this statute, depend on the proof there may be of their success in drawing to the support of their design those who may be called capitalists, or does it depend upon the character of the design itself, and upon what has been done towards its accomplishment by themselves and by those in voluntary co-operation with them, from whatever employment or walk in life?

I have not failed, I think, to appreciate the just force of the argument to the contrary of my opinion,—it has sometimes entangled me in doubt,—but my conclusion is clear that, under the act of 1890, the court had jurisdiction of the case presented in the application, and that the injunction granted was not without authority of law, nor for any reason invalid.

This brings me to the question of fact: Did the defendants violate the injunction? The evidence upon the question is voluminous, but need not be reviewed in detail. The injunction issued July 2d, and on the 3d and 4th was served upon the defendants Debs, Howard, Rogers, and Keliher. It was not served upon the other defendants, and in one of the briefs it is contended that only parties to a bill can be charged

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with violating an injunction; that while strangers to a suit in chancery may be liable for willful interference, their cases stand upon the same footing as ordinary criminal contempts, and their answers are conclusive. Authorities cited: *Watson v. Fuller*, 9 How. Pr. 425; *Kip v. Deniston*, 4 Johns. 24; *Boyd v. State*, 19 Neb. 128, 26 N. W. 925; *Lord Eldon's Opinion*, 7 Ves. 257-259; *State v. Anderson*, 5 Kan. 90, 114; *Elliott v. Osborne*, 1 Cal. 396; *Jewett v. Bowman*, 27 N. J. Eq. 171; [756] *Coddington v. Webb*, 4 Sandf. 639. In another brief the weight of authority is conceded to be that one who has actual notice of an injunction is bound by it. *Rapalje*, Contempt, 46; *Ewing v. Johnson*, 34 How. Pr. 202; *Waffle v. Vanderheyden*, 8 Paige 45. I know of no authority and perceive no reason for treating the answer of a stranger to the bill as conclusive, while the answer of a party to the bill is not conclusive.

The testimony of newspaper reporters shows that on July 4th Debs said to one of them:

"I have done nothing unlawful. I have kept myself strictly within the provisions of Judge Caldwell's decision, * * * and I shan't change my course of conduct in any way by reason of the service of this injunction."

Again, on the 7th, that:

"There had been another injunction served upon him, and it should not make the slightest difference in the manner in which the American Railway Union was doing its business; it had kept within the bounds of the law."

To another, on July 2d, he had said, in substance—

"That he was not afraid of any court or grand jury, or of any injunction as he had done nothing to be enjoined against, and that the American Railway Union would continue the fight on the same lines they had commenced."

July 3d the defendant Burns, who, it should be observed, in responding jointly with his codefendants Hogan and others to interrogatories, had asserted that they were not informed of the injunction until near the end of the strike, in answer to the inquiry of the reporter what they should do about it, said:

"Why, they would simply laugh at the injunction; that the Railway Union knew its rights; that they had not done anything wrong,—had not interfered with interstate commerce or mails or passengers;

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that they had simply called off their men; that they had not done anything contrary to the injunction; that they had a right to strike peaceably."

These declarations are not brought forward for the purpose of showing that the defendants held or expressed sentiments of contempt for the order of the court. Whether they did or not is immaterial here. Their conduct only is in question, and these expressions are quoted because they confirm the inference deducible from other evidence, that no essential and voluntary modification of their course of action either followed or was caused by the injunction. Their original intention, it is true, was only to prevent the use of Pullman cars, but finding, as they did, immediately, that that aim would be thwarted by the discharge from service of men who refused to handle those cars, they began as early as June 27th, the day after the boycott was proclaimed, to issue orders to strike; and from that time to the end, to the extent of their ability, they conducted and controlled the strike with persistent consistency of purpose, and with unchanged methods of action. What they did the first day they did, in substance, each succeeding day, so that it is not necessary to discriminate very closely between what was done before and what after service of the injunction.

As officers of the American Railway Union, it is beyond question that the defendants had practical control of the strike, guiding as they chose the movements of the men actively engaged. Is it [757] true, as they assert, that they did nothing, and advised or instigated nothing, unlawful, and nothing contrary to the injunction? Leaving out of view for the moment the rule that co-conspirators are responsible for the deeds of each other, done in furtherance of the common design, is it true that the defendants, in the exercise of their acknowledged leadership, did no more than advise a peaceable strike or withdrawal of their followers from railroad service, or did they counsel and encourage such violence and intimidation as they knew to be necessary to prevent the equipment and moving of trains? To the charge of the information that they knew "that violence invariably follows all strikes of a similar character," they answered by denying that "they knew that violence and unlawful con-

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duct necessarily follows from strikes of the kind mentioned." When, at an early stage of the case, the court suggested that in the use of the word "necessarily" the answer was not responsive to the information, where the word "invariably" was employed, the variance was stated by counsel to have been inadvertent, and leave was taken to amend; but, instead of an amendment curing the defect, a supplemental answer was filed, which merely denies such averments and parts of the information as they had not "in their former answer expressly admitted or denied." On this point, Hogan and the other defendants to the second information speak more explicitly, denying "that they or either of them knew or could have known that any such acts were certain or almost certain, or probable or reasonably to be expected, to follow from such strikes or cessation of labor." While this is not perceived to be equivocal or evasive, it is difficult to understand how intelligent men familiar with the subject, as these men may be presumed to have been, could honestly affirm it. Strikes by railroad employes have not been infrequent of late years in this country, and the testimony of the one witness who spoke on the subject, and whose experience and intelligence made him apparently quite competent to speak, accord with what I suppose to be common knowledge,—that they have been attended generally, if not in every instance, with some form of intimidation or force. The witness said he knew of no exception. Under the conditions of last summer, when there were many idle men seeking employment, it was impossible that a strike which aimed at a general cessation of business upon the railroads of the country should succeed without violence; and it is not to be believed that the defendants entered upon the execution of their scheme without appreciating the fact, and without having determined how to deal with it. The inference therefore is a fair one, aside from direct evidence to the point, that they expected and intended that this strike should differ from others only in magnitude of design and boldness of execution, and that the accustomed accessories of intimidation and violence, so far at least as found essential to success, would not be omitted. For that much the striking workmen, acting on the promptings of self-interest, without instigation or direct suggestion, and

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even in spite of admonitions to the contrary, may ordinarily be counted on. Such admonitions against violence were [758] sent out occasionally by the defendants, but it does not appear that they were ever heeded; and I am not able to believe on the evidence that, in the fullest sense, it was expected or intended that they should be. I am able and quite ready to believe that the defendants not only did not favor, but deprecated, extreme violence, which might lead to the destruction of property or of human life; but they were not unwilling that coupling pins should be drawn; that Pullman cars should be "cut out" and side tracked; that switches should be turned and trains derailed; that cars should be overturned and tracks obstructed; that false or contradictory signals should be given to moving trains; that the strikers and lawless rioters should wear a common badge, and should assemble together upon the tracks and yards of the companies to obstruct business; that engineers and firemen should be pulled from their cabs, if by persuasion or threats they could not be induced to leave them; that the unemployed should be deterred by threats or abuse from taking the places of strikers; and that engines should be "plugged," or otherwise "killed." These things, and the like of them, were done daily in Chicago and elsewhere by members, and sometimes by officers, of the local unions, without protest or condemnation, and some of them at the instigation of the defendants, who, it can hardly be doubted, were well aware of what was going on. When, therefore, in his address of June 29th, "To the Railway Employés of America," Debs said: "I appeal to the strikers everywhere to refrain from any act of violence. Let there be no interference with the affairs of the companies involved, and, above all, let there be no act of depredation. A man who will destroy property or violate law is an enemy, and not a friend, to the cause of labor. The great public is with us," etc.,—the chief aim, I am convinced, was to secure the good will of the public. To that end the warnings against acts of depredation or visible destruction of property, it may well be believed, were sincere; but their followers did not understand, and the court cannot believe, that it was intended to

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forbid intimidation and the milder forms of violence, which did not directly involve the destruction of property or severe injury to person, and which for that reason, it seems, were assumed to be not unlawful, when employed in the interests of organized labor in a contest with "an alliance of rich and powerful corporations." By just what theories of law and duty they were governed might be better understood, perhaps, if in that part of the answer which alleges "that upon the service of the injunction the defendants consulted competent counsel, learned in the law, and, upon a full and fair statement of the facts in the premises, they were advised what they might rightfully and lawfully do without violating the order of the court, and that since that time they have in all things proceeded in accordance with that advice," they had disclosed, as they ought to have done, just what statement of the facts they made to counsel, and what advice they received. Without such disclosure, either in the answer or the proof, the alleged advice neither justifies nor mitigates a wrong or error committed in pursuance of the advice, but raises, rather, a presumption that a full [759] statement would not be advantageous. Proof was made of portions of the testimony of Mr. Debs on the 20th of August before the commission appointed by the President, wherein, among other things, he said:

"It is understood that a strike is war; not necessarily a war of blood and bullets, but a war in the sense that it is a conflict between two contending interests or classes of interests. There is more or less strategy, too, in war, and this was necessary in our operation. Orders were issued from here, questions were answered, and our men were kept in line from here. * * * As soon as the employes found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had been permitted to remain upon the field, among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. * * * Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, * * * not by the army, and not by any other power, but simply and solely by the action of the United States court in restraining us from discharging our duties as officers and representatives of our employes."

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In answer to an inquiry what, if anything, he did to ascertain whether his men were concerned in violence, he said:

"We did that [by] our committee, which called at headquarters every evening and advised us. They were instructed to guard the company's property, if they were near it at all, and to apprehend anyone that might be caught destroying property. This instruction was given again and again to the central committee that went out from headquarters. We said we knew that if there was trouble, if there was disorder and riot, we would lose, because we knew enough by experience in the past that we had everything to lose by riot, and nothing to gain. We said that man who incites riot or disorder is our enemy, and we have got to be the first to apprehend and bring him to justice. So we called upon our men, and advised them, urged them, to do everything in their power to maintain order, because we felt and knew that if there was perfect order there was no pretext upon which they could call out the soldiers, or appeal for the intervention of the court, and we would win without a question of a doubt."

One or two reflections upon these statements will be enough: First, with all that is said about guarding property, keeping the peace, and being the first to arrest offenders, not one was arrested, and no effort was made by strikers or members of the Railway Union to preserve the peace or to protect property. On the contrary, many of them were leaders in scenes of violence and disorder. Second, if this strike, like others, was understood to be war, not necessarily of blood and bullets, but a conflict between contending interests or classes of interests, in which strategy had to be employed to keep the men in line, it was more than a peaceable strike, or mere cessation from work. Had it been only that, the injunction, instead of being a hindrance, would have been in their hands the very weapon they needed to enable them to suppress the violence and disorder in which alone, they say, they saw possible danger to the success of their cause.

"When the trouble began," said Mr. Debs again, in his testimony before the commission, "there were thousands of telegrams and communi- [760] cations pouring in, and it was impossible for me to see them all personally, because I was out among the men, meeting with committees, meeting at different cities, and addressing meetings, and all that kind of work; so it was really impossible for all those telegrams that were coming in to come under my personal notice. So then the work was apportioned by the board to its members. This young man named Benedict (who had been employed

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as an assistant secretary) answered, by instruction of the board, some telegrams, and in other cases, where the board was all absent, he answered telegrams himself. Telegrams, when he had answered others of a kindred character, he would answer without instructions." The inconsistency of these statements with the averments of the answer of the defendants to the original information, denying responsibility for the telegrams sent and received, is too evident to need comment, but they are quoted here not so much to point out the discrepancy as to show the activity of Mr. Debs, his intimate connection with the conduct of the strike, and consequently his direct responsibility for what was done. By his admission, he was out among the men, meeting committees, and addressing meetings. It is shown also by the testimony of two or more witnesses that on the night of June 29th he and Howard and Keliher attended a meeting of the local union at Blue Island, a suburb of Chicago, on the line of the Rock Island & Pacific Railroad; that he and Howard each addressed the men, urging them to join the strike; that, among other things, one or both of them said the men "ought to stand together and go out in a body"; that if others came to take their places "they ought to make them walk the plank." In the language of the witnesses, "They told the workmen there that the only way to resist the orders of the general managers in cutting down the wages of the men in detail on the different roads was by unanimously organizing and standing by,—all standing together. Debs told them not to molest the mail trains, but," as the witness puts it, "not to let the Pullman cars out, at no hazards." Howard "advised the men not to do any violence, or anything like that, but to go out, and stay out, man to man, and they would win the victory." "Howard said not to commit any violence, but not to allow any Pullman cars to run, at no hazard." "He said all those that didn't go out and stay out, and help the laboring class of people out of trouble, will have to walk the plank in the future." These speeches did not mean, and were not understood by the men to whom they were addressed to mean, that no resistance should be made by them to the running of Pullman

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cars, or that they should submit unresistingly to the employment of other men to take their places. They voted that night to join the strike, and on the next day inaugurated "a condition of turbulence" which a witness declared he "did not believe could exist." "A body of men, principally ex-employés of the Rock Island road, blockaded traffic, threatened violence, and tied up the road." "The same condition, only worse, July 1st," and notwithstanding the efforts of the United States marshal, by reading the injunction and otherwise, to quell the disturbance, nothing was accomplished until the 5th of July, when federal soldiers arrived. With that assistance, through trains began to be moved, and the transportation of the mails was resumed on the 7th or 8th, but it was not until the 14th that traffic on that line was fully restored. These things directly followed, and in large measure, I think it not unwarranted to say, were the natural and probable result of, the speeches made and counsel given to the men by Debs and Howard at the meeting on the night of the 29th at Blue Island. Similar suggestions, calculated to incite to acts of violence or intimidation, were contained in many of the telegrams which were sent out over the name of Debs, and for which, notwithstanding the averment of their sworn answers to the contrary, it is no longer possible for any of the defendants to evade some measure of responsibility. I quote from a few of them, commencing June 27th:

"A boycott has been declared against the Pullman Company, and no Pullman cars are to be handled." "If men are discharged for refusing to handle Pullman cars, every employé should at once leave the service of the company."

June 28th:

"No forcible interference with mail trains, but any man who handles trains or cars will be a scab." "No loyal man will handle any train at all on your system." "Tie up every line possible, to enforce boycott. Do not cut any cars from mail trains, but no loyal man will move a train of any kind under existing conditions." "Passenger train came south this morning, and will be held here." (To Debs from Las Vegas.) "If your company refuses to boycott Pullman, tie it up."

June 29th:

In substance: Leave denied for train at Livingston, Montana, to proceed with sick passengers. "All taking part in this struggle will

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receive protection of A. R. U., whether members or not." "Pay no attention to injunction orders. Men will not be slaves."

June 30th:

"This is a fight against combined capital and oppression, and we are assured winners. Do no violence, but every man stand pat and firm." "No fear about reinstatement. All lines in Chicago are paralyzed. Impossible to get scabs to fill places in time." "Do not interfere with mail trains in any manner."

July 1st:

"Knock it to them as hard as possible." "Have men stand firm. They show a better front in Ohio than you. * * * I do not suspect Grand Junction of housing scabs or sucklings of autocrats."

July 2d:

"The train will haul your car to its destination on presentation of this telegram." (To Mrs. Leland Stanford.) "All who work during present strike will be branded as scabs."

July 3d:

"This is authority to call out roads named." "Tie up Big Four." "Get your men out immediately." "It will take more than injunctions to move trains. Get everybody out." "Wear a white ribbon, instead of red. We have requested our friends to wear white in Chicago." "Let everybody wear white ribbon who are in favor, and all opposed wear red." "Do not let court order scare you. I have had orders served on me. We are breaking no laws. You and all strikers have quit your places peaceably, as is your right. * * * Don't be silly."

[762] July 4th:

"Have your men stand pat. They will have to make many arrests before this strike is over. We all stand firm. Arresting men will not operate the road." "To call out troops was an old method of intimidation. Commit no violence. Have every man stand pat. Troops cannot move trains. Not scabs in the world to fill places, and more occurring hourly." "This is authority to call out P. D. & E."

July 5th:

"The lines are now sharply drawn. Capital has declared war. Any man who works is assisting capital to defeat labor." (Richards of St. Paul to Debs): "Send all good news possible. * * * Look after locals on all roads, and play the strongest card left."

July 8th:

"You cannot paralyze the world in a minute. Do not let strong men become childish. * * * You appear to be paying more attention to newspapers than to messages."

July 10th:

"Debs, Howard, Kellher, Rogers, in jail. Rest expect to go. This is the last act of the corporations. Our cause is just. Victory certain. Stand pat. [Signed] Hogan."

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July 14th:

"All negotiations off. Stand to a finish now."

The condition as it was on the 12th of July is aptly described in the letter of that date signed by Debs, Howard, and Keliher, as officers of the American Railway Union, and addressed, "To the Railway Managers." It is set out in full as a part of the information,^a and if more convincing evidence of the nature of the strike, and of the direct personal and official responsibility of the defendants for what was done, and for the results, were needed, it is found in that document.

But the defendants are not entitled to be judged solely by the rules which determine the responsibility of one who has acted without combination or agreement with another. The bill upon which the injunction was ordered charged them with conspiracy, as, under the statute, it must have done, in order to bring them within the cognizance of the court. Conforming to the allegations of the bill, the injunction, in substance, commanded them, and all combining or conspiring with them, "to desist and refrain" from interfering with the business, rolling stock, and other property of the roads named; from using force, threats, or persuasion to induce employes of the roads to neglect duty; from using force or threats to induce employes to quit, or other persons not to enter, the service of the roads; from doing any act in furtherance of a conspiracy to interfere with interstate commerce on the roads; and from ordering, aiding, or abetting any person to do the forbidden things. It is not necessary to consider whether this injunction, when properly construed, forbids, or whether it might lawfully have been made to forbid, the employes of the railroad companies to quit work in furtherance of the alleged conspiracy, or to forbid others, in aid of the conspiracy, to persuade or advise them to quit. The order was not intended when issued. [763] and will not now be construed, to go so far. In the recent case of *Arthur v. Oakes* (C. C. A., 7th Circuit), 63 Fed. 310, it was decided, with my full concurrence in the opinion, that a court of equity will not "under any circumstances, by

^a Ante, p. 310.

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injunction, prevent one individual from quitting the personal service of another"; and in respect to the right of employ  s, singly or in concert, to quit work, and of others to advise them on the subject, there is no present necessity for adding to what was said in that case, further than to observe that neither expressly nor by implication does the opinion there delivered lend the remotest sanction to the proposition asserted by one of the counsel for the defendants, that in free America every man has a right to abandon his position, for a good or a bad reason, and that another, for good or bad reason, may advise or persuade him to do so. Manifestly, that is not true. If it were, a servant might quit his place, and another might advise him to quit, in order to make way for the entry of thieves or burglars into the employer's house,—a suggestion at which simple minds revolt, and for which the acutest can invent neither justification nor apology. The rule is familiar in criminal jurisprudence that any act, however innocent in itself, becomes wrongful or criminal when done in furtherance of an unlawful design. But whether or not, in a particular case, an injunction will be appropriate, and to what extent it shall go if granted, will depend on other considerations than the mere wrongfulness or illegality of the act or conduct proposed to be enjoined. The right of men to strike peaceably, and the right to advise a peaceable strike, which the law does not presume to be impossible, is not questioned. But if men enter into a conspiracy to do an unlawful thing, and, in order to accomplish their purpose, advise workmen to go upon a strike, knowing that violence and wrong will be the probable outcome, neither in law nor in morals can they escape responsibility.

The evidence establishes, and it has not been denied, that on the 21st day of June, 1894, the American Railway Union, in convention at Chicago, declared a boycott against the Pullman palace cars, to take effect after five days if meanwhile the Pullman Company should not accede to a proposed arbitration with striking workmen; that the convention, after conferring upon the directors of the union jurisdiction over all matters connected with the boycott, adjourned on the 25th of June; that on the next day the following notice or order was issued, over the signature of the president of

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the union: "June 26, 1894, 1:30 p. m. Boycott against Pullman cars in effect at noon to-day. By order of convention. E. V. Debs,"—and that on the same day the following telegram was sent to the general officers of labor organizations throughout the country:

"A boycott against the Pullman Company, to take effect at noon to-day, has been declared by the American Railway Union. We earnestly request your aid and co-operation in the fight of organized labor against a powerful and oppressive monopoly. Please advise if you can meet with us in conference, and, if not, if you will authorize some one to represent you in this matter. Address 421 Ashland Block. Eugene V. Debs, President."

Pullman cars in use upon the roads are instrumentalities of commerce, and it follows that from the time of this announcement, if not [764] from the adoption of the resolution by the convention, the American Railway Union was committed to a conspiracy in restraint of interstate commerce, in violation of the act of July 2, 1890, and that the members of that association, and all others who joined in the movement, became criminally responsible each for the acts of others done in furtherance of the common purpose, whether intended by him or not. The officers became responsible for the men, and the men for the officers. While I do not accede to the proposition which was advanced in *Patterson's Case*, for the purpose of invalidating or of putting a narrow construction upon the statute, that a conspiracy to commit a specified offense includes a conspiracy to commit any other offense which may result and does result from an attempt to commit the offense intended, the rule is well settled, and I suppose well understood, that all who engage, either as principals or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. *Brennan v. People*, 15 Ill. 511; *Hanna v. People*, 86 Ill. 243; *Lamb v. People*, 96 Ill. 74; Whart. Cr. Law, § 1405; 1 Bish. Cr. Law, 636; Hawk. P. C. c. 29, § 8. I quote:

"Upon this ground [says Hawkins, supra], it has been adjudged that where persons combine together to stand by one another in the

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breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view."

"A man may be guilty of a wrong which he did not specifically intend [says Bishop], if it came naturally, or even accidentally, through some other specific, or a general evil, purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable."

In *State v. McCahill* (Iowa) 30 N. W. 553, the court said:

"Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged."

These defendants were the directors and general officers of the American Railway Union, and had practical control of the organization. They procured the adoption of the resolutions by which the boycott of the Pullman cars was declared, and authority given themselves to begin and control the movement. They put themselves at once in telegraphic communication with the officers of local unions, advising them of the action of the convention, and that no Pullman cars were to be handled; but, it appearing very soon that men who refused to handle Pullman cars were being discharged, they determined to prevent the running of all trains upon all the roads until the companies should accede to their demands, including the reinstatement of men who had been discharged. Later the Pullman strikers were abandoned, and only the re-employment of [765] railroad men insisted on. As early as the 27th of June they sent out telegrams directing men to quit work if the running of Pullman cars was insisted upon, and unless discharged men were restored to their places, and by the 28th it had become the distinct policy "to get the men out"; "to tie up" or paralyze the roads; to promise full protection to all who joined in the strike; to denounce as scabs, or as traitors to the cause of labor, all who refused to go out, and all who should consent to take places which others had abandoned,—and later the form or substance of expression became: "All employés of all roads will stand together"; "None will return until all return." By this course the original conspiracy against the use of Pullman cars became a

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conspiracy against transportation and travel by railroad. Upon their own authority, without consulting the local unions, the defendants converted the boycott into a strike; and with the aid of followers, some of whom stopped at no means between the drawing of a coupling pin and the undermining of a bridge, whereby men should be hurled to death, they pushed the strike to the conditions which prevailed when the intervention of the court was asked, and which, in the end, compelled the employment of military force to re-establish peace and start again the activities of commerce. The evidence leaves no feature of the case in doubt. The substance of it, briefly stated, is that the defendants, in combination with the members of the American Railway Union and others, who were prevailed upon to co-operate, were engaged in a conspiracy in restraint or hindrance of interstate commerce over the railroads entering Chicago, and, in furtherance of their design, those actively engaged in the strike were using threats, violence, and other unlawful means of interference with the operations of the roads; that by the injunction they were commanded to desist, but, instead of respecting the order, they persisted in their purpose, without essential change of conduct, until compelled to yield to superior force.

Much has been said, but without proof, of the wrongs of the workmen at Pullman, of an alliance between the Pullman Company and the railway managers to depress wages, and generally of corporate oppression and arrogance. But it is evident that these things, whatever the facts might have been proved or imagined to be, could furnish neither justification nor palliation for giving up a city to disorder, and for paralyzing the industries and commerce of the country.

My conclusion in the case on the information of the United States implies a like conclusion in the other case, tried at the same time and upon the same evidence, wherein, by an information presented by the receivers of the Santa Fé Railroad, the defendants were charged with wrongful and violent interference with the operation of that road pending the strike. That they did interfere as alleged, is established by the evidence already considered. Though violation of the

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injunction of July 2d is alleged in the bill, the questions of jurisdiction and of the construction and application of the act of 1890 are not essentially involved, because, the property being in the custody of the court, any improper interference with its manage- [766] ment, it is well settled, constituted a contempt of the court's authority, as exercised in making the order appointing the receivers and enjoining interference with their control. The decision, or rather letter, of Judge Caldwell has been referred to, but, while that recognized the right of employes to quit the service of the receivers, it contained no warrant for intimidating or abusing those who were willing to take employment, or for otherwise interfering directly, as the defendants and their followers did, with the management and operation of the road. The court therefore finds the defendants (except McVean, whose case is held under advisement) guilty of contempt as charged in each of the cases. The same sentences will be ordered in both cases, but it is not intended that they shall be cumulative.

[821] PIDCOCK v. HARRINGTON ET AL.

(Circuit Court, S. D. New York. December 20, 1894.)

[64 Fed., 821.]

MONOPOLIES—SUIT BY PRIVATE INDIVIDUAL.—The act "to protect trade and commerce against unlawful restraints and monopolies" (Act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States.*

This was a suit by John F. Pidcock against Dennis Harrington and others for an injunction and accounting. Defendants demurred to the bill.

[822] This is a suit in equity against the above-named defendant, and a number of others, praying for an injunction and an accounting on the ground that the defendants have conspired to ruin complainant's business as a commission merchant and dealer in live stock. The bill alleges that the defendants have ceased dealing with the com-

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plainant and have threatened to cease dealing with people who deal with him. The action is founded upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209).

William F. Randel, for complainant.

Edward C. Boardman, for defendants.

Coxe, District Judge.

At the argument the counsel for the complainant was asked whether he sought to maintain this action under the general equity principles of the common law or under the provisions of the act of July 2, 1890. He answered that it was founded solely upon the statute. It is unnecessary, therefore, to discuss the proposition whether or not the action can be maintained independently of the statute. The demurrer challenges the jurisdiction of this court to maintain, under the act in question, a bill in equity filed by a private individual and his solicitor. It is clear that the right to maintain such a suit is not expressly conferred by the act. Indeed, such right is, by implication, denied—First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms? The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6 there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The

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only section which gives a private remedy is the seventh, which is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

But for this section no private person would have any standing in court, and as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan*, 54 Fed. 40, affirmed 56 Fed. 696, 6 C. C. A. 86. The demurrer is allowed.

[1] UNITED STATES v. E. C. KNIGHT COMPANY.***APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.**

No. 875. Argued October 24, 1894.—Decided January 21, 1895.

[156 U. S., 1.]

The monopoly and restraint denounced by the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life.^b

The American Sugar Refining Company, a corporation existing under the laws of the State of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business. *Held*, that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not

* Bill dismissed by Circuit Court, En. D. Penn. (60 Fed., 306). See p. 250. Decree affirmed by Circuit Court of Appeals, Third Circuit (60 Fed., 934). See p. 258. Affirmed by the Supreme Court (156 U. S., 1).

^b Syllabus and abstract of argument copyrighted, 1895, by Banks & Bros.

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be suppressed under the provisions of the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies," in the mode attempted in this suit; and that the acquisition of Philadelphia refineries by a New Jersey corporation, and the business of sugar refining in Pennsylvania, bear no direct relation to commerce between the States or with foreign nations.

[2] THIS was a bill filed by the United States against E. C. Knight Company and others, in the Circuit Court of the United States for the Eastern District of Pennsylvania, charging that the defendants had violated the provisions of an act of Congress approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, "providing that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several States, shall be guilty of a misdemeanor." The bill alleged that the defendant, the American Sugar Refining Company, was incorporated under and by virtue of the laws of New Jersey, whose certificate of incorporation named the places in New Jersey and New York at which its principal business was to be transacted, and several other States in which it proposed to carry on operations, and stated that the objects for which said company was formed were "the purchase, manufacture, refining, and sale of sugar, molasses, and melads, and all lawful business incidental thereto;" that the defendant, E. C. Knight Company, was incorporated under the laws of Pennsylvania "for the purpose of importing, manufacturing, refining and dealing in sugars and molasses," at the city of Philadelphia; that the defendant, the Franklin Sugar Company, was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and the purchase of raw material for that purpose," at Philadelphia; that the defendant, Spreckels Sugar Refining Company, was incorporated under the laws of Pennsylvania "for the purpose of refining sugar, which will involve the buying of the raw material therefor

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and selling the manufactured product, and of doing whatever else shall be incidental to the said business of refining," at the city of Philadelphia; that the defendant, the Delaware Sugar House, was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and syrups, and preparing the same for [3] market, and the transaction of such work or business as may be necessary or proper for the proper management of the business of manufacture."

It was further averred that the four defendants last named were independently engaged in the manufacture and sale of sugar until on or about March 4, 1892; that the product of their refineries amounted to thirty-three per cent of the sugar refined in the United States; that they were competitors with the American Sugar Refining Company; that the products of their several refineries were distributed among the several States of the United States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; that the American Sugar Refining Company had, on or prior to March 4, 1892, obtained the control of all the sugar refineries of the United States with the exception of the Revere of Boston, and the refineries of the four defendants above mentioned; that the Revere produced annually about two per cent of the total amount of sugar refined.

The bill then alleged that in order that the American Sugar Refining Company might obtain complete control of the price of sugar in the United States, that company, and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, machinery, and real estate of the other four corporations defendant, by which they attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other States as theretofore carried on independently by said defendants; that in pursuance of this scheme, on or about March 4, 1892, Searles entered into a contract with the defendant Knight Company and individual stockholders named, for the purchase of all the stock of that company, and subsequently delivered to the defendants therefor in exchange shares of the American Sugar Refining Company;

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that on or about the same date Searles entered into a similar contract with the Spreckels Company and individual stockholders, and with the Franklin Company and stockholders, and with the Delaware Sugar House and stockholders. It was further averred that the American Sugar Refining Company monopolized the manufacture and [4] sale of refined sugar in the United States, and controlled the price of sugar; that in making the contracts, Searles and the American Sugar Refining Company combined and conspired with the other defendants to restrain trade and commerce in refined sugar among the several States and foreign nations, and that the said contracts were made with the intent to enable the American Sugar Refining Company to restrain the sale of refined sugar in Pennsylvania and among the several States, and to increase the regular price at which refined sugar was sold, and thereby to exact and secure large sums of money from the State of Pennsylvania, and from the other States of the United States, and from all other purchasers, and that the same was unlawful and contrary to the said act.

The bill called for answers under oath, and prayed—

"1. That all and each of the said unlawful agreements made and entered into by and between the said defendants, on or about the fourth day of March, 1892, shall be delivered up, cancelled, and declared to be void; and that the said defendants, the American Sugar Refining Company and John E. Searles, Jr., be ordered to deliver to the other said defendants respectively the shares of stock received by them in performance of the said contracts; and that the other said defendants be ordered to deliver to the said defendants, the American Sugar Refining Company and John E. Searles, Jr., the shares of stock received by them respectively in performance of the said contracts.

"2. That an injunction issue preliminary until the final determination of this cause, and perpetual thereafter, preventing and restraining the said defendants from the further performance of the terms and conditions of the said unlawful agreements.

"3. That an injunction may issue preventing and restraining the said defendants from further and continued violations of the said act of Congress, approved July 2, 1890.

"4. Such other and further relief as equity and justice may require in the premises."

Answers were filed and evidence taken, which was thus [5] sufficiently summarized by Judge Butler in his opinion in the Circuit Court:

"The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jer-

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say, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries [6] and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House Refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Co.; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."

The Circuit Court held that the facts did not show a contract, combination, or conspiracy to restrain or monopolize trade or commerce "among the several States or with foreign nations," and dismissed the bill. 60 Fed. Rep. 306. The cause was taken to the Circuit Court of Appeals for the Third Circuit, and the decree affirmed. 60 Fed. Rep. 934. This

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appeal was then prosecuted. The act of Congress of July 2, 1890, c. 647, is as follows:

"An act to protect trade and commerce against unlawful restraints and monopolies."

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one [7] year, or by both said punishments, in the discretion of the court."

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary [8] restraining order or prohibition as shall be deemed just in the premises."

"SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the for-

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feiture, seizure, and condemnation of property imported into the United States contrary to law.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"Sec. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 26 Stat. 209, c. 647.

Mr. Solicitor General and *Mr. S. F. Phillips*, (with whom was *Mr. Attorney General* on the brief,) for appellants.

Mr. John G. Johnson, (with whom was *Mr. John E. Parsons* on the brief,) for appellees.

[9] *Mr. Chief Justice Fuller*, after stating the case delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such relief could be afforded under that prayer as would be agreeable to the case made by the bill and consistent with that specifically prayed. And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to

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monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested.

In commenting upon the statute, 21 Jac. 1, c. 3, at the commencement of chapter 85 of the third Institute, entitled "Against Monopolists, Propounders, and Projectors," Lord Coke, in language often quoted, said:

"It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamental laws of this Kingdome. And therefore it is necessary to define what a monopoly is.

"A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole [10] buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindred in their lawfull trade.

"For the word monopoly, *dicitur ἀπὸ τοῦ μόνου (i. solo,) καὶ πωλεῖσθαι (i. vendere.) quod est cum unus solus aliquod genus mercaturæ universum vendit, ut solus vendat, pretium ad suum libitum statuens:* hereof you may read more at large in that case. Trin. 44 Eliz. Lib. 11, f. 84, 85; *le case de monopolies.*" 3 Inst. 181.

Counsel contend that this definition, as explained by the derivation of the word, may be applied to all cases in which "one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure," whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of Congress is not confined to the common law sense of the term as implying an exclusive control, by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life.

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In the view which we take of the case, we need not discuss whether because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize; or, because, according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved; or, because others were theoretically left [11] free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries after becoming stockholders of the American Company might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left

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free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict [12] with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. *Gibbons v. Ogden*, 9 Wheat. 1, 189, 210; *Brown v. Maryland*, 12 Wheat. 419, 448; *The License Cases*, 5 How. 504, 599; *Mobile v. Kimball*, 102 U. S. 691; *Bowman v. Chicago & N. W. Railway*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 555.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to

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regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

[13] It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States; the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in *Coe v. Errol*, 116 U. S. 517, 525, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion

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of the court, said: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic [14] law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

And again, in *Kidd v. Pearson*, 128 U. S. 1, 20, 21, 22, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short,

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every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the [15] South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multifarious and vital interests—interests which in their nature are and must be local in all the details of their successful management. . . . The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantage of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be

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difficult to imagine." And see *Veazie v. Moor*, 14 How. 568, 574.

In *Gibbons v. Ogden*, *Brown v. Maryland*, and other cases [16] often cited, the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in *Kidd v. Pearson* the refusal of a State to allow articles to be manufactured within her borders even for export was held not to directly affect external commerce, and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from

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the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs, [18] to grant the relief prayed, and dismissed the bill, and

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we are of opinion that the Circuit Court of Appeals did not err in affirming that decree.

Decree affirmed.

MR. JUSTICE HARLAN, dissenting.

Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey for the purpose of buying, manufacturing, refining, and *selling sugar in different parts of the country*, had obtained the control of *all* the sugar refineries in the United States except five, of which four were owned and operated by Pennsylvania corporations—the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company, and the Delaware Sugar House—and the other, by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about thirty-three per cent, and that of the Boston company about two per cent, of the entire quantity of sugar refined in the United States.

In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation—using for that purpose its own stock—purchased the stock of those companies, and thus obtained absolute control of the entire business of sugar refining in the United States except that done by the Boston company, which is too small in amount to be regarded in this discussion.

“The object,” the court below said, “in purchasing the Philadelphia refineries was to obtain a greater influence or *more perfect control over the business of refining and selling sugar in this country.*” This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not therefore analyze the evidence upon this point. In its consideration of the important constitutional question presented, this court assumes on the record before us [19] that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the

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manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.

The court holds it to be vital in our system of government to recognize and give effect to both the commercial power of the nation and the police powers of the States, to the end that the Union be strengthened and the autonomy of the States preserved. In this view I entirely concur. Undoubtedly, the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished. "Without the States in union," this court has said, "there could be no such political body as the United States." *Lane County v. Oregon*, 7 Wall. 71, 76. But it is equally true that the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that government was ordained by the People of the United States; and the destruction of *that* authority would be fatal to the peace and well-being of the American people. The Constitution which enumerates the powers committed to the nation for objects of interest to the people of all the States should not, therefore, be subjected to an interpretation so rigid, technical, and narrow, that those objects cannot be accomplished. Learned counsel in *Gibbons v. Ogden*, 9 Wheat. 1, 187, having suggested that the Constitution should be strictly construed, this court, speaking by Chief Justice Marshall, said that when the original States "converted their league into a [20] government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature empowered to enact laws

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on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." "What do gentlemen mean," the court inquired, "by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, one might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument—for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded." p. 188. On the same occasion the principle was announced that the objects for which a power was granted to Congress, especially when those objects are expressed in the Constitution itself, should have great influence in determining the extent of any given power.

Congress is invested with power to regulate commerce with foreign nations and among the several States. The power to regulate is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised whenever necessary throughout the territorial limits of the several States. *Cohens v. Virginia*, 6 Wheat. 264, 413. The power to make these regulations "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." It is plenary because vested in Congress "as absolutely as it [21] would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It may be exercised "whenever the subjects exists." *Gibbons v. Ogden*, 9 Wheat. 1, 195, 196. In his concurring opinion in that case,

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Mr. Justice Johnson observed that the grant to Congress of the power to regulate commerce carried with it the whole subject, leaving nothing for the State to act upon, and that "if there was any one object riding over every other in the adoption of the Constitution, it was to keep commercial intercourse among the States free from *all* invidious and partial restraints." p. 231. "In all commercial regulations we are one and the same people." Mr. Justice Bradley, speaking for this court, said that the United States are but one country, and are and must be subject to one system of regulations in respect to interstate commerce. *Robbins v. Shelby Taxing District*, 120 U. S. 489, 494.

What is commerce among the States? The decisions of this court fully answer the question. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It does not embrace the completely interior traffic of the respective States—that which is "carried on between man and man in a State, or between different parts of the same State and which does not extend to or affect other States"—but it does embrace "every species of commercial intercourse" between the United States and foreign nations and among the States, and, therefore, it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the People of United States. "Commerce, as the word is used in the Constitution, is a unit," and "cannot stop at the external boundary line of each State, but may be introduced into the interior." "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally."

These principles were announced in *Gibbons v. Ogden*, and have often been approved. It is the settled doctrine of this [22] court that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected. In *County of Mobile v. Kimball*, 102 U. S. 691, 702, it was said that "commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including, in these terms, naviga-

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tion and the transportation and transit of persons and property, *as well as* the purchase, sale, and exchange of commodities." In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, the language of the court was: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, *as well as* the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions." In *Kidd v. Pearson*, 128 U. S. 1, 20, it was said that "the buying and selling, and the transportation *incidental thereto* constitute commerce." Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations.

In the light of these principles, determining as well the scope of the power to regulate commerce among the States as the nature of such commerce, we are to inquire whether the act of Congress of July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, is repugnant to the Constitution.

By that act "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," is declared to be illegal, and every person making any such contract, or engaging in any such combination or conspiracy, [23] is to be deemed guilty of a misdemeanor, and punishable, on conviction, by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. § 1. It is also made a misdemeanor, punishable in like manner, for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the

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several States or with foreign nations." § 2. The act also declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories or any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and prescribes the same punishments for every person making any such contract, or engaging in any such combination or conspiracy. § 3.

The fourth section of the act is in these words: "Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It would seem to be indisputable that no *combination* of corporations or individuals can, *of right*, impose unlawful restraints upon *interstate* trade, whether upon transportation or upon such interstate intercourse and traffic as precede trans- [24] portation, any more than it can, *of right*, impose unreasonable restraints upon the completely internal traffic of a State. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a *combination* of corporations or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish

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one primary object of the Union, which was to place commerce *among the States* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.

The fundamental inquiry in this case is, What, in a legal sense, is an unlawful restraint of trade?

Sir William Erle, formerly Chief Justice of the Common Pleas, in his essay on the Law Relating to Trades Unions, well said that "restraint of trade, according to a general principle of the common law, is unlawful;" that "at common law every person has individually, and *the public also have collectively*, a right to require that *the course of trade* should be kept free *from unreasonable obstruction*;" and that "the right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law." pp. 6, 7, 8.

There is a partial restraint of trade which, in certain circumstances, is tolerated by the law. The rule upon that subject is stated in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 66, where it was said that "an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. *Horner v. Graves*, 7 Bing. 735, 743. A contract, even on good consideration, not to use a trade anywhere in England is held void in that country as being too general a restraint of trade."

[25] But a general restraint of trade has often resulted from *combinations* formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character have frequently been the subject of judicial scrutiny, and have always been condemned as illegal because of their necessary tendency to

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restrain trade. Such combinations are against common right and are crimes against the public. To some of the cases of that character it will be well to refer.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, 184, 186, 187, the principal question was as to the validity of a contract made between five coal corporations of Pennsylvania, by which they divided between themselves two coal regions of which they had the control. The referee in the case found that those companies acquired under their arrangement the power to control the entire market for bituminous coal in the northern part of the State, and their combination was, therefore, a restraint upon trade and against public policy. In response to the suggestion that the real purpose of the combination was to lessen expenses, to advance the quality of coal, and to deliver it in the markets intended to be supplied in the best order to the consumer, the Supreme Court of Pennsylvania said: "This is denied by the defendants; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal field; that it is the great source of supply of bituminous coal to the State of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel, and this is accomplished by a combination of all the companies engaged in this branch of business [26] in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void." Again, in the same case: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit. the combination resorted to by these five companies. Singly

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each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence. 'I take it,' said Gibson, J., 'a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the [27] latter, whether of extortion or of mischief.' *Commonwealth v. Carlisle*, Brightly, (Penn.) 40. In all such combinations where the purpose is injuries or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent." "There is a potency in numbers when combined, which the law cannot overlook, where injury is the consequence."

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This case in the Supreme Court of Pennsylvania was cited with approval in *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which involved the validity of a contract between two coal companies, the object and effect of which was to give one of them the monopoly of the trade in coal in a particular region, by which the price of that commodity could be artificially enhanced. The Court of Appeals of New York held that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal. . . . If they should be sustained, the prices of articles of pure necessity, such as coal, flour and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited." See also *Hooker v. Vandewater*, 4 Denio, 351, 352; *Stanton v. Allen*, 5 Denio, 484; *Saratoga Bank v. King*, 44 N. Y. 87.

In *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672, the principal question was as to the legality of an association of substantially all the manufacturers of salt in a large salt producing territory. After adverting to the rule that contracts in general restraint of trade are against public policy, and to the agreement there in question, it was said: "Public policy, unquestionably, favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public. [28] . . . The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, the courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

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In *Craft v. McConoughy*, 79 Illinois, 346, 349, 350, which related to a combination between all the grain dealers of a particular town to stifle competition, and to obtain control of the price of grain, the Supreme Court of Illinois said: "While the argument, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was, to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country. That the effect of this contract was to restrain the trade and commerce of the country, is a proposition that cannot be successfully denied. We understand it to be a well-settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable." "While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the right of competition, were all the [29] guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection."

These principles were applied in *People v. Chicago Gas Trust Co.*, 130 Illinois, 269, 292, 297, which involved the validity of a corporation formed for the purpose of operating gas works, and of manufacturing and selling gas, and which, for the purpose of destroying competition, acquired the stock of four other gas companies, and thereby obtained a monopoly

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in the business of furnishing illuminating gas to the city of Chicago and its inhabitants. The court, in declaring the organization of the company to be illegal, said: "The fact that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and by crushing out competition to monopolize the gas business in Chicago." "Of what avail," said the court, "is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?"

So, in *India Bagging Association v. Kock*, 14 La. Ann. 168, where the court passed upon the legality of an association of various commercial firms in New Orleans that were engaged in the sale of India bagging, it was said: "The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Santa Clara Mill & Lumber Co. v. Hayes*, 76 California, 387, 390, which related to a combination, the result of certain contracts among certain manufacturers, the court found that the object, purpose, and consideration of those contracts was to form a combination among all the manufacturers of lumber [30] at or near a particular place, for the sole purpose of increasing the price of that article, limiting the amount to be manufactured, and giving certain parties the control of all lumber manufactured near that place for the year 1881, and of the supply for that year in specified counties. It held the combination to be illegal, observing that "among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade; contracts between individuals to prevent competition and keep up the price of articles of utility."

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It further said that while the courts had nothing to do with the results naturally flowing from the laws of demand and supply, they would not respect agreements made for the purpose of "taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities."

A leading case on the question as to what combinations are illegal as being in general restraint of trade, is *Richardson v. Buhl*, 77 Michigan, 632, 635, 657, 660, which related to certain agreements connected with the business and operations of the Diamond Match Company. From the report of the case it appears that that company was organized, under the laws of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States, and to monopolize and control the business of making all the friction matches in the country, and establish the price thereof. To that end it became necessary, among other things, to buy many plants that had become established or were about to be established, as well as the property used in connection therewith. Chief Justice Sherwood of the Supreme Court of Michigan said : "The sole object of the corporation is to make money by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation—an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 people. The article thus completely under their control, for the last fifty years, has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes and in carrying out its object that the contract in this case was made between those parties, which we are now asked to aid in enforcing. Monopoly in trade, or in any kind of business

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in this country, is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control in the interest of the public. Its tendency is, however, destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provisions in several of our state constitutions. . . . All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies and intolerable; and ought to receive the condemnation of all courts."

In the same case, Mr. Justice Champlin, with whom Mr. Justice Campbell concurred, said: "There is no doubt that all the parties to this suit were active participants in perfecting the combination called 'The Diamond Match Company,' and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. [32] The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful and against public policy." See also *Raymond v. Leavitt*, 46 Michigan, 447, and *Texas Standard Oil Co. v. Adoue*, 83 Texas, 650.

This extended reference to adjudged cases relating to unlawful restraints upon the interior traffic of a State has been made for the purpose of showing that a combination such as that organized under the name of the American Sugar Refining Company has been uniformly held by the courts of the States to be against public policy and illegal because of its

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necessary tendency to impose improper restraints upon trade. And such, I take it, would be the judgment of any Circuit Court of the United States in a case between parties in which it became necessary to determine the question. The judgments of the state courts rest upon general principles of law, and not necessarily upon statutory provisions expressly condemning restraints of trade imposed by or resulting from combinations. Of course, in view of the authorities, it will not be doubted that it would be competent for a State, under the power to regulate its domestic commerce and for the purpose of protecting its people against fraud and injustice, to make it a public offence punishable by fine and imprisonment, for individuals or corporations to make contracts, form combinations, or engage in conspiracies, which unduly restrain trade or commerce carried on within its limits, and also to authorize the institution of proceedings for the purpose of annulling contracts of that character, as well as of preventing or restraining such combinations and conspiracies.

But there is a trade among the several States which is distinct from that carried on within the territorial limits of a State. The regulation and control of the former is committed by the national Constitution to Congress. Commerce among the States, as this court has declared, is a unit, and in respect of *that* commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot [33] interfere with the enforcement of such rules. The jurisdiction of the general government extends over every foot of territory within the United States. Under the power with which it is invested, Congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the States. In so doing it would not interfere with the "autonomy of the States," because the power thus to protect interstate commerce is expressly given by the people of all the States. Interstate intercourse, trade, and traffic is absolutely free, except as such intercourse, trade, or traffic may be incidentally or indirectly affected by the exercise by the States of their reserved police powers. *Sherlock v. Alling*, 93 U. S. 99, 103. It is the Constitution, the supreme law of the land, which invests Congress with power to pro-

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tect commerce among the States against burdens and exactions arising from unlawful restraints by whatever authority imposed. Surely a right secured or granted by that instrument is under the protection of the government which that instrument creates. Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch v. Maryland*, 4 Wheat. 316, 405.

It has been argued that a combination between corporations of different States, or between the stockholders of such corporations, with the object and effect of controlling not simply the manufacture but the price of refined sugar throughout the whole of the United States—which is the case now before us—cannot be held to be in restraint of “commerce among the States” and amenable to national authority, without conceding that the general government has authority to say what shall and what shall not be *manufactured* in the several States. [34] *Kidd v. Pearson*, 128 U. S. 1, was cited in argument as supporting that view. In that case the sole question was, whether the State of Iowa could forbid the *manufacture* within its limits of ardent spirits intended for sale ultimately in other States. This court held that the manufacture of intoxicating liquors in a State is none the less a business within the State subject to state control because the manufacturer may intend, at his convenience, to export such liquors to foreign countries or to other States. The authority of the States over the manufacture of strong drinks within their respective jurisdictions was referred to their plenary power, never surrendered to the national government, of providing for the health, morals, and safety of their people.

That case presented no question as to a *combination* to monopolize the sale of ardent spirits manufactured in Iowa to be sold in other States—no question as to combinations

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in restraint of trade as involved in the buying and selling of articles that are intended to go, and do go, and will always go, into commerce throughout the entire country, and are used by the people of all the States, and the making or manufacturing of which no State could forbid consistently with the liberty that every one has of pursuing, without undue restrictions, the ordinary callings of life. There is no dispute here as to the lawfulness of the business of refining sugar, *apart from the undue restraint which the promoters of such business, who have combined to control prices, seek to put upon the freedom of interstate traffic in that article.*

It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid the *mere* refining of sugar in any State, would be in excess of any power granted to Congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at *combinations* that unduly restrain, because they monopolize, *the buying and selling of articles* which are to go into interstate commerce. In *State v. Stewart*, 59 Vermont, 273, 286, it was said that if a *combination* of persons "seek to restrain trade, or tend to the destruction of the material prop- [35] erty of the country, they work injury to the whole people." And in *State v. Glidden*, 55 Connecticut, 46, 75, the court said: "Any one man, or any one of several men acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase. . . . The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime." Chief Justice Gibson well said in *Commonwealth v. Carlisle*, Brightly, (Penn.) 36, 41: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition; but

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the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." These principles underlie the act of Congress, which has for its sole object the protection of such trade and commerce *as the Constitution confides to national control*, and the question is presented whether the *combination* assailed by this suit is an unlawful restraint upon interstate trade in a necessary article of food which, as every one knows, has always entered, now enters and must continue to enter, in vast quantities, into commerce among the States.

In *Kidd v. Pearson* we recognized, as had been done in previous cases, the distinction between the mere transportation of articles of interstate commerce and the *purchasing and selling that precede transportation*. It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manu- [36] factured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation, and are as much commercial intercourse, where articles are bought *to be* carried from one State to another, as is the manual transportation of such articles after they have been so purchased. The distinction was recognized by this court in *Gibbons v. Ogden*, where the principal question was whether commerce included navigation. Both the court and counsel recognized buying and selling or barter *as included in commerce*. Chief Justice Marshall said that the mind can scarcely conceive a system for regulating commerce, which was "*confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter.*" pp. 189, 190.

The power of Congress covers and protects the absolute freedom of such intercourse and trade among the States as may or must succeed manufacture and precede transportation from the place of purchase. This would seem to be conceded;

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for, the court in the present case expressly declare that "*contracts to buy, sell, or exchange goods to be transported among the several States*, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, *may be regulated*, but this is *because they form part of interstate trade or commerce*." Here is a direct admission—one which the settled doctrines of this court justify—that contracts to buy and the purchasing of goods *to be transported from one State to another*, and transportation, with its instrumentalities, are all *parts* of interstate trade or commerce. Each part of such trade is then under the protection of Congress. And yet, by the opinion and judgment in this case, if I do not misapprehend them, Congress is without power to protect the commercial intercourse that such purchasing necessarily involves against the restraints and burdens arising from the existence of *combinations* that meet purchasers, from whatever State they come, with the threat—for it is nothing more nor less than a threat—that they *shall not* purchase what [37] they desire to purchase, *except at the prices fixed by such combinations*. A citizen of Missouri has the right to go in person, or send orders, to Pennsylvania and New Jersey for the purpose of purchasing refined sugar. But of what value is that right if he is confronted in those States by a vast *combination* which absolutely controls the price of that article by reason of its having acquired all the sugar refineries in the United States in order that they may fix prices in their own interest exclusively?

In my judgment, the citizens of the several States composing the Union are entitled, of right, to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which by the law everywhere is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate

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intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States, in all recognized articles of commerce, absolutely free from unreasonable or illegal restrictions imposed by combinations, is justified by an express grant of power to Congress and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

Undue restrictions or burdens upon the purchasing of goods, in the market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *State* within whose limits the business of refining sugar is exclusively carried on may not constitutionally im- [38] pose burdens upon purchases of sugar *to be transported to other States*, how comes it that combinations of corporations or individuals, within the same State, may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article *to be carried from the State in which such purchases are made*? If the national power is competent to repress *State* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may—so far as national power and interstate commerce are concerned—do, with impunity, what no State can do.

Suppose that a suit were brought in one of the courts of the United States—jurisdiction being based, it may be, alone upon the diverse citizenship of the parties—to enforce the stipulations of a written agreement, which had for its object to acquire the possession of all the sugar refineries in the United States, in order that those engaged in the combina-

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tion might obtain the entire control of the business of refining and selling sugar throughout the country, and thereby to increase or diminish prices as the particular interests of the combination might require. I take it that the court, upon recognized principles of law common to the jurisprudence of this country and of Great Britain, would deny the relief asked and dismiss the suit upon the ground that the necessary tendency of such an agreement and combination was to restrain, not simply trade that was completely internal to the State in which the parties resided, but trade and commerce among all the States, and was, therefore, against public policy and illegal. If I am right in this view, it would seem to follow, necessarily, that Congress could enact a statute forbidding such combinations so far as they affected interstate commerce, and provide for their suppression as well through civil proceedings instituted for that purpose, as by penalties against those engaged in them.

[39] In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power except those arising from the general nature of the government, or such as are embodied in the fundamental guarantees of liberty and property. It gives to Congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of Congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief-Justice Marshall three-quarters of a century ago, and which has been repeatedly affirmed by this court. That rule is: "The sound construction of the Constitution must allow to the national legislature the discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are

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appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421. The end proposed to be accomplished by the act of 1890 is the protection of trade and commerce among the States against unlawful restraints. Who can say that that end is not legitimate or is not within the scope of the Constitution? The means employed are the suppression, by legal proceedings, of combinations, conspiracies, and monopolies, which by their inevitable and admitted tendency, improperly restrain trade and commerce among the States. Who can say that such means are not appropriate to attain the end of freeing commercial intercourse among the States from burdens and exactions imposed upon it by combinations which, under principles long recognized in this country as well as at the [40] common law, are illegal and dangerous to the public welfare? What clause of the Constitution can be referred to which prohibits the means thus prescribed in the act of Congress?

It may be that the means employed by Congress to suppress combinations that restrain interstate trade and commerce are not all or the best that could have been devised. But Congress, under the delegation of authority to enact laws necessary and proper to carry into effect a power granted, is not restricted to the employment of those means "without which the end would be entirely unattainable." "To have prescribed the means," this court has said, "by which government should, in all future time, execute its powers, would have been to change entirely the character of that instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to

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inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch v. Maryland*, 4 Wheat. 316, 415, 423.

By the act of 1890, Congress subjected to forfeiture "any property owned under any contract or by any combination, or pursuant to any conspiracy, (and being the subject thereof,) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country." It was not deemed wise to subject such property to forfeiture before transportation began or after it ended. If it be suggested that Congress might have prohibited the *transportation* from the State in which they are manufactured of any articles, by whomsoever at the time owned, that had been [41] manufactured by combinations formed to monopolize some designated part of trade or commerce among the States, my answer is that it is not within the functions of the judiciary to adjudge that Congress shall employ particular means in execution of a given power, simply because such means are, in the judgment of the courts, best conducive to the end sought to be accomplished. Congress, in the exercise of its discretion as to choice of means conducive to an end to which it was competent, determined to reach that end through civil proceedings instituted to prevent or restrain these obnoxious combinations in their attempts to burden interstate commerce by obstructions that interfere *in advance of transportation* with the free course of trade between the people of the States. In other words, Congress sought to prevent the coming into existence of combinations, the purpose or tendency of which was to impose unlawful restraints upon interstate commerce.

There is nothing in conflict with these views in *Coe v. Errol*, 116 U. S. 517, 529. There the question was whether certain logs cut in New Hampshire, and hauled to a river that they might be transported to another State, were liable to be *taxed* in the former State before actual transportation to the latter State began. The court held that the logs might be taxed while they remained in the State of their origin as part of the general mass of property there; that "for *this purpose*"—taxation—the property did not pass from the juris-

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diction of the State in which it was until transportation began. The scope of the decision is clearly indicated by the following clause in the opinion of Mr. Justice Bradley: "How can property thus situated, to wit, deposited or stored at the place of entrepôt for future exportation, be taxed in the regular way as part of the property of the State? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed or assessed for taxation in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its situation." As we have now no question as to the *taxation* of articles manufactured by one of the combinations condemned by the act of Congress, and [42] as no one has suggested that the State in which they may be manufactured could not *tax* them *as property* so long as they remained within its limits, and before transportation of them to other States began, I am at a loss to understand how the case before us can be affected by a decision that personal property, while it remains in the State of its origin, although it is to be sent at a future time to another State, is within the jurisdiction of the former State for purposes of taxation.

The question here relates to restraints upon the freedom of interstate trade and commerce imposed by illegal combinations. After the fullest consideration I have been able to bestow upon this important question, I find it impossible to refuse my assent to this proposition: Whatever a State may do to protect its completely interior traffic or trade against unlawful restraints, the general government is empowered to do for the protection of the people of all the States—for this purpose one people—against unlawful restraints imposed upon interstate traffic or trade in articles that are to enter into commerce among the several States. If, as already shown, a State may prevent or suppress a *combination*, the effect of which is to subject its domestic trade to the restraints necessarily arising from their obtaining the absolute control of the sale of a particular article in general use by the community, there ought to be no hesitation in allowing to Congress the right to suppress a similar *combination* that imposes a like

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unlawful restraint upon interstate trade and traffic in that article. While the States retain, because they have never surrendered, full control of their completely internal traffic, it was not intended by the framers of the Constitution that any part of interstate commerce should be excluded from the control of Congress. Each State can reach and suppress combinations so far as they unlawfully restrain its interior trade, while the national government may reach and suppress them so far as they unlawfully restrain trade among the States.

While the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one State to be carried to another State as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the States. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country, in the buying and selling of articles—especially the necessities of life—that go into commerce among the States. The doctrine of the autonomy of the States cannot properly be invoked to justify a denial of power in the national government to meet such an emergency, involving as it does that freedom of commercial intercourse among the States which the Constitution sought to attain.

It is said that there are no proofs in the record which indicate an *intention* upon the part of the American Sugar Refining Company and its associates to put a restraint upon trade or commerce. Was it necessary that formal proof be made that the persons engaged in this combination admitted,

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in words, that they intended to restrain trade or commerce? Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain interstate trade or commerce? Men who form and control these combinations are too cautious and wary to make such admissions orally or in writing. Why, it is conceded that the object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object [44] is disclosed upon the very face of the transactions described in the bill. And it is proved—indeed, it is conceded—that that object has been accomplished to the extent that the American Sugar Refining Company now controls ninety-eight per cent of all the sugar refining business in the country, and therefore controls the price of that article everywhere. Now, the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law—there being no adjudged case to the contrary in this country—a direct restraint of trade in the article for the control of the sales of which in this country that combination was organized. And that restraint is felt in all the States, for the reason, known to all, that the article in question goes, was intended to go, and must always go, into commerce among the several States, and into the homes of people in every condition of life.

A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without buyers being burdened by unlawful restraints imposed by combinations of corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the

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absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness—so powerful that no single State is able to overthrow them and give the required protection to the whole country, and so all-pervading that they threaten the integrity of our institutions.

We have before us the case of a combination which absolutely controls, or may, at its discretion, control the price of all [45] refined sugar in this country. Suppose another *combination*, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals, and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power—one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?

To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. "Powerful and ingenious minds," this court has said, "taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that

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the original powers of the States are retained if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived." *Gibbons v. Ogden*, 9 Wheat. 1, 222.

While a decree annulling the contracts under which the [46] combination in question was formed, may not, in view of the facts disclosed, be effectual to accomplish the object of the act of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the States, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which Congress intended to accomplish, namely, to protect the freedom of commercial intercourse among the States against combinations and conspiracies which impose unlawful restraints upon such intercourse.

For the reasons stated I dissent from the opinion and judgment of the court.

[637] DUEBER WATCH-CASE MANUF'G CO. v. E. HOWARD WATCH & CLOCK CO. ET AL.*

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

[66 Fed., 637.]

MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE—ANTI-TRUST LAW OF 1892.—An action was brought in the United States circuit court for the Southern district of New York by a manufacturing company against numerous competitors, in various states, alleging

* Demurrer sustained by Circuit Court, Southern district of New York (55 Fed., 851). See p. 178.

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the formation of a combination, and an attempt to create a monopoly, "in violation of the statutes of this state and the United States," whereby plaintiff's business was injured. The formation of the combination was laid on and prior to November 16, 1887, but it was alleged that after the passage of the act of congress of July 2, 1890, defendants ratified, renewed, and confirmed their previous contracts, combinations, etc. Judgment was demanded for treble damages "under and by virtue of the statute." Plaintiff was not a resident of the district where the action was brought, and the case was heard upon the demurrer of a defendant who was also a nonresident, but was "found" within the district; thus making a case in which jurisdiction is expressly conferred by section 7 of the said act of July 2, 1890. The demurrer was sustained, and in all the assignments of error it was contended that the facts charged in the complaint made out a case under that act. *Held*, that the action must be deemed to be founded upon the said act of July 2, 1890.*

SAME.—In an action brought by a manufacturer of watch cases against numerous other manufacturers thereof, residing in various states, to recover treble damages under the act of congress of July 2, 1890 (26 Stat. 209), prohibiting unlawful restraints and monopolies of interstate commerce, the complaint alleged that the plaintiff operated an extensive factory, first in Kentucky and afterwards in Ohio; that previous to November 16, 1887, it sold all its goods to a great number of dealers "throughout the United States and Canada"; that prior to that date defendants had agreed with each other to maintain arbitrary and fixed prices for their watch cases; that, for the purpose of compelling plaintiff to join with them therein, defendants on said date mutually agreed that they would not thereafter sell any goods to persons who bought or sold goods manufactured by plaintiff; that they caused notice thereof to be served upon the many dealers [638] in such goods throughout the United States and Canada, who had formerly dealt in plaintiff's goods, whereupon many of such dealers withdrew their patronage from plaintiff; that after the passage of the act of July 2, 1890, defendants ratified, renewed, and confirmed their previous agreements, and served notice of such ratification upon all said dealers in plaintiff's goods, whereby said dealers were compelled to refuse to purchase plaintiff's watch cases. *Held*, that the complaint failed to state a cause of action under the statute; Lacombe, Circuit Judge, holding that no monopolizing or combination to monopolize interstate commerce, contrary to the second section of the act, was shown, for the reason that the allegations did not preclude the inference that each defendant may have sold his entire product in the state where it was manufactured; and that

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the contracts did not produce an unlawful restraint of trade, under the first section, because the combination and agreement to fix arbitrary prices did not appear to include all manufacturers of watch cases, but was only a partial restraint in respect to an article not of prime necessity, and therefore came within the recognized limits of lawful contracts; and that the further agreement not to sell to customers of plaintiff was a lawful means of enlarging and protecting the business of the defendants. Shipman, Circuit Judge, concurring on the more technical ground that the acts of the defendants, whether viewed as an attempt to create a monopoly or as a contract in restraint of trade, were not shown to concern interstate commerce, because there were no allegations showing the residence of any dealers who withdrew their patronage from complainant, and it therefore did not directly appear that any of them resided outside of the state where plaintiff's goods were manufactured. Wallace, Circuit Judge, dissenting on the ground that the allegations were sufficient to show that the attempts to monopolize and restrain did operate upon interstate commerce; and that, while the contracts might not be unlawful in themselves, yet the purpose for which they were alleged to be made, namely, to compel plaintiff to join in the agreement for fixing arbitrary prices, and to injure and destroy its business if it refused to do so, was oppressive and unjust, and rendered the acts of defendants unlawful under both sections of the statute.

This was an action by the Dueber Watch-Case Manufacturing Company against the E. Howard Watch & Clock Company and numerous other individuals and corporations, to recover damages alleged to have been caused to plaintiff's business by the alleged unlawful acts and combinations of defendants. The case was first heard in the circuit court upon the demurrer of the E. Howard Watch & Clock Company to the first amended complaint, and the demurrer was sustained, the opinion of the circuit court therein being reported in 55 Fed. 851. A demurrer was afterwards sustained to the second amended complaint, but no opinion was written, and plaintiff now brings error to review this latter judgment.

Robert Sewell, for plaintiff in error.

Edward B. Hill and *Elihu Root*, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

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LACOMBE, Circuit Judge.

The complainant corporation is a citizen of Ohio, the demurring defendant corporation a citizen of Massachusetts, engaged in the business of manufacturing and selling watch movements, and having a place of business in the city of New York, state of New York. Of the nineteen other defendants, ten are individuals whose citizenship is not set forth in the complaint. It is averred that they are engaged in business, two of them in New York City under one firm name, two others in [639] Philadelphia and New York City under another firm name, three others in the city of New York under another firm name, and three others in Cincinnati under still another firm name. The nine remaining defendants are corporations, two of them citizens of Massachusetts, two citizens of New York, two citizens of Connecticut, two citizens of Illinois, and one a citizen of Pennsylvania.

The complainant avers that plaintiff is a corporation duly created and existing under the laws of Ohio, and engaged in the business of manufacturing gold and silver watch cases. That at the times mentioned in the complaint it owned and operated an extensive factory at Newport, Ky., and subsequently at Canton, Ohio; that it maintained the same at great expense, and had the capacity to manufacture and offer for sale in the open market 25,000 watch cases per month. In the third paragraph it is averred "that prior to November 16, 1887, plaintiff had a ready market throughout the United States and Canada for all the goods it could manufacture, and in fact sold all of said goods to a great number of dealers therein throughout said territory, and thereby fully earned and realized to itself a substantial legitimate profit of at least \$75,000 per annum." Next follow averments as to the incorporation and partnership of the several defendants, who, it is stated, are respectively engaged in the business of manufacturing or selling watches, watch cases, or watch movements. In the eighteenth paragraph it is averred that on or about November 16, 1887, the defendants, and others to plaintiff unknown, at and in the city of New York, mutually agreed together each for himself with

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all the others that "they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by this plaintiff." It is further averred that thereafter defendants caused notice of this agreement or compact to be given to the many dealers in watches, watch cases, and watch movements throughout the United States and Canada; and gave said notices to "many of the then and theretofore purchasers and dealers in plaintiff's goods manufactured as aforesaid"; whereupon a large number of such purchasers and dealers withdrew their patronage, and ceased thereupon entirely to purchase and deal in any wise in plaintiff's goods. The complaint further alleges that after said November 16, 1887, defendants refused to sell their goods to purchasers of and dealers in plaintiff's goods who had offered to buy defendants' goods, stating as the reason for their refusal that said dealers also bought and sold and dealt in plaintiff's watches, notifying such purchasers and dealers that if they would promise not to deal in plaintiff's goods, then, and so long as they kept such promise, they might purchase the goods of the defendants or either of them; otherwise not. In the twenty-third paragraph it is alleged that prior to November 16, 1887, the defendants had agreed among themselves, "and which said agreement has been in operation and effect between them ever since, that they would agree upon and agree to maintain an arbitrary fixed price to the public for all the goods manufactured by them, and in pursuance of said agreement the said defendants had agreed [640] upon an arbitrary price, and fixed the same for all the goods manufactured by them." The agreement of November 16, 1887, is alleged to be "in addition to and furtherance of said prior agreement, and made and entered into for the sole purpose of compelling this plaintiff to join with them in said first-named agreement." All these acts of defendants are alleged to have been done "for the purpose of establishing a monopoly in the supply of watches to the public, contrary to the policy of the law, and in violation of the statutes of this state and the United States, and to cut off this plaintiff from any participation in such business unless it joined in

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said illegal and vicious conspiracy, and the acts of defendants thereunder, in furtherance thereof, as alleged, and to crush competition, and enable the defendants to maintain the prices fixed as they pleased by them as aforesaid for their commodities with regard only to their private emolument and profit, contrary to the benefit of the public; the said defendants, by the said combination, conspiracy, and agreements and acts thereunder, maliciously intending to injure this plaintiff, and drive it out of business, and prevent it from selling its watch cases," etc. It is further alleged that "by the extended influence and power acquired by the combination over the trade" defendants forced and prevented persons from dealing with the plaintiff, or purchasing its goods, under the threat of a refusal themselves to deal with such purchasers; that said threats were effectual, and did prevent a great number of persons who otherwise would have purchased large quantities of the goods of the plaintiff from purchasing the same, and did effect in fact against the plaintiff a complete boycott and ostracism from the trade, and prevented the lawful and ordinary competition of business which plaintiff had a right to enjoy. The concluding paragraph of the complaint alleges that after the passage by congress of the act of July 2, 1890, "all the former purchasers and dealers in plaintiff's watch cases and other dealers in watch cases were, as plaintiff is informed and believes, ready and willing to buy large quantities of said plaintiff's goods, and this plaintiff would have regained all the business and the profits thereof whereof it had been deprived by the acts aforesaid of defendants; but that said defendants, after the passage of the said act of congress, ratified, confirmed, renewed, and continued the contracts, agreements, and combinations hereinbefore alleged, and in like manner, and with the same intention as hereinbefore alleged, served notices of their ratification, confirmation, renewal, and continuance of said agreements and combinations upon all said dealers in plaintiff's watch cases, whereby said dealers have continued to this day, forced by said renewed threats of defendants, and compelled thereby, and not otherwise, to refuse to purchase plaintiff's watch cases, or to deal anyway therein, whereby the said defendants illegally

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and maliciously damaged the plaintiff in the sum of \$150,000." Judgment is demanded, not for the \$150,000, but, "under and by virtue of the statute of the United States hereinbefore referred to, for three times the amount of damages so sustained by it in the premises, to wit, for the sum of \$450,000."

[641] The federal statute of July 2, 1890 (26 Stat. 209), declared upon in the complaint is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The relevant parts of this statute are as follows:

"Section 1. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal." [Then follow provisions declaring the act a misdemeanor, and providing for punishment.]

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be guilty of a misdemeanor." [Then follow provisions as to punishment therefor.]

"Sec. 7. Any person who shall be injured in his business by any other person or corporation by reason of anything forbidden or declared unlawful in this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

This action is manifestly one under the act of July 2, 1890. It is brought in a district where neither the plaintiff nor the demurring defendant resides, but where the demurring defendant is found. In the face of a complaint so framed as to present a cause of action under the statute, a defendant, if "found" here, could not object to the jurisdiction. It is expressly given by the seventh section. It would be manifestly unfair to permit a plaintiff to bring a defendant into this court on a complaint declaring upon the statute, and thereafter, when such defendant has failed to question its jurisdiction under the statute, and has appeared generally in the case, to transform the cause of action into one at common law, and insist that defendant has waived any objection to the jurisdiction. Moreover, although the complaint contains allegations as to combinations and threats long prior to the passage of the act of 1890, the averment of pecuniary damage to the plaintiff, which is specified in the twenty-seventh or concluding paragraph, is averred to have been sustained

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in consequence of the "renewed threats" of defendants (that is, those renewed after the passage of the act), which compelled dealers to refuse to purchase plaintiff's watch cases or to deal in any wise therein. Moreover, judgment is demanded, not for plaintiff's actual damages, but for treble damages, "under and by virtue of the statute." The counsel for plaintiff in error asserts in his filed brief that "the action is founded solely upon the act of congress passed July 2, 1890, the [seventh] section whereof expressly provides that the circuit court of the United States shall have exclusive jurisdiction of such action." There are 23 separate assignments of error, in each and all of which it is contended that the facts charged in the complaint make out a case under the act of 1890. Therefore, unless the complaint sets forth a cause of action under the act of 1890, the demurrer should be sustained.

The only acts of defendants as to which plaintiff can in this action contend that they are "forbidden or declared to be unlawful by this act" are those done after its passage. They are set forth in the twenty-seventh paragraph, and are as follows: (1) Defendants "ratified, confirmed, renewed, and continued" an agreement between themselves, that they would agree upon and agree to maintain an arbitrary fixed price to the public for all the goods manufactured by them. (2) They "ratified, confirmed, renewed, and continued" an arbitrary price, and fixed the same for all goods manufactured by them. (3) They "ratified, confirmed, renewed, and continued" an agreement that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by the plaintiff. (4) They served notices of such ratification, confirmation, renewal, and continuance of these three agreements upon all those persons who were former dealers in plaintiff's watch cases. The remaining averments of the twenty-seventh paragraph refer not to defendants' acts, but to the consequences of those acts; the principal consequence being that the former purchasers and dealers in plaintiff's watch cases and other dealers in watch cases were compelled to refuse to purchase plaintiff's goods.

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The question to be decided is whether these acts are within either the prohibition of the first section of the statute of 1890 as a contract or combination in "restraint of trade," or within the prohibition of the second section as a "monopolizing" or as an "attempt to monopolize." Whatever differences of opinion there may be as to the meaning of these words when used in this statute, there is and can be no dispute as to one qualification expressed in the act,—the trade or commerce restrained or monopolized or attempted to be monopolized must be interstate or international. The statute expressly so says, and, whatever its phraseology, it must be so construed if it is to stand, since it is only such trade and commerce that congress has authority to regulate. No monopolizing or attempt or combination or conspiracy to monopolize any part of such trade or commerce is set forth in the complaint. The several manufacturers defendant are charged with an attempt to secure to each of them a sale of his or its own products to the exclusion of those of the plaintiff, but there is nothing to show that each defendant does not sell his or its entire product in the very state where it is manufactured. The sale within a state of articles manufactured in the same state is no part of interstate trade or commerce. *U. S. v. E. C. Knight Co.* (Jan. 21, 1895) 15 Sup. Ct. 249. The circumstance that, after manufactured products are thus sold within the state, they may be again sold for introduction into another state, and thus become a subject of interstate commerce, does not change the situation, for it is only when a commodity has begun to move as an article of trade from one state to another that commerce in that commodity between states has commenced. *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475. The complaint, therefore, fails to charge an offense against section 2 of the act of 1890.

The complaint alleges that the acts of defendants subsequent to July 2, 1890, have forced and compelled persons who theretofore dealt in plaintiff's goods to refuse to purchase the same, and avers that prior to November 16, 1887, plaintiff sold its goods to a [643] great number of dealers throughout the United States and Canada, plaintiff manufacturing such goods first in Kentucky, and afterwards in Ohio. And plaintiff's counsel contends that this sufficiently

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charges such a restraint of interstate and international trade as is obnoxious to the first section of the statute. The phrase used in the act of 1890, viz. "restraint of trade," is no new one. It had theretofore been used by courts applying the doctrines of the common law in determining the validity of contracts. It is to be presumed that the lawmakers, when they chose this phrase, intended that it should have, when used in the statute, no other or different meaning from that which had always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used, for the act is described as one "to protect trade and commerce against unlawful restraints and monopolies"; and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator. *U. S. v. Palmer*, 3 Wheat. 610. The "restraint of trade" which is obnoxious to the provisions of the first section must be of such kind as was, before the passage of the act, recognized as unlawful. *In re Greene*, 52 Fed. 104; *U. S. v. Trans-Missouri Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15. It may be assumed that the total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity enter into a combination in the form of a partnership, and by ingenious advertising, or by the devices of business competition, or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent the trade of one or more of their competitors therein. But no one, not even the plaintiff in error, contends that the statute forbids any such acts, although, if the words be taken with absolute literalness, the phrase "restraint of trade" is broad enough to cover them. A most elaborate discussion of the meaning of this phrase "restraint of trade," with a careful review of all the leading authorities bearing upon the question, is found in the opinion of the United States circuit court of appeals for the Eighth circuit in *U. S. v. Trans-Missouri Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15. The conclusion reached by that court—and on that branch of the case there was no dissent—is that where it is a question as to private parties engaged in private pursuits, and not dealing in staple commodities of prime necessity, "it is not the existence of

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the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade." And that "contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon the trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition." A like statement of the law is found in *Navigation Co. v. Winsor*, 20 Wall. 64, 66, where the supreme court holds that "an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. [644] In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made."

It remains only to inquire whether the contract or combination set out in the complaint is in restraint of interstate or international trade in the sense in which the phrase "restraint of trade" is used in the act of 1890. The first alleged unlawful action of defendants charged upon them subsequent to the passage of the act is a renewal and confirmation of an agreement among themselves to "maintain an arbitrary fixed price to the public for all the goods manufactured by them," and a carrying out of such agreement by thus fixing and maintaining a price. The goods in question are not articles of prime necessity, as were the flour, coal, and other staple commodities referred to in many of the cases cited upon the argument; nor were the manufacturing defendants engaged in any public or quasi public business, as were the railroads or the gaslighting companies referred to in other cases. Each one of the defendants had an undoubted right to determine for himself the price at which he would sell the goods he made, and he certainly does not lose that right by deciding to sell them at the same price at which a dozen or so of his competitors sell the goods which they make. Collectively the defendants owe no duty to any one of their competitors to regulate the price they fix for their goods so as not to interfere with the price he fixes for his own. And it is difficult to see how the public is injuri-

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ously affected by any such agreement between the combining manufacturers. If the price so fixed is the normal and usual one theretofore prevailing, certainly the public cannot complain; still less if the price be reduced. If a combination of the capital and business abilities and factory appliances of many different manufacturing establishments enables them to produce an equally good output at a reduced cost, so that they can sell such output cheaper than any single manufacturer could, surely the public does not suffer. If, on the contrary, the combining defendants fix the price too high, they restrain their own trade only; the public will buy the goods it wants, not from them, but from their competitors. There are no averments in the complaint to show that the defendants are all, or even substantially all, of the manufacturers of watch cases in the United States, or even in any single one of the different states wherein their manufactories are located. For aught that appears, they represent but a small part of the watch-case industry, and there is nothing to prevent the number of their competitors from increasing to whatever extent the public demand for such goods may require. This is no such case as that presented in *Arnot v. Coal Co.*, 68 N. Y. 558, where, as was said, "the region of the production of [anthracite coal] is known to be limited." There is nothing in the complaint nor in common knowledge to show that the production of watch cases may not be practically unlimited. An agreement, therefore, between some of the makers of watch cases to sell their commodities at a uniform price, which they fix upon with regard only to their private emolu- [645] ment and profit, is not an agreement in general restraint of trade, or unreasonably injurious to the public welfare, within the authorities.

The other contract or combination which plaintiff contends to be unlawful is the agreement of defendants not to sell goods of their manufacture to any one who thereafter should buy or sell goods manufactured by the plaintiff. To the extent that such refusal to deal with those persons who dealt with plaintiff induced such persons to cease dealing with the plaintiff, and to buy watch cases from one or other of the defendants, the agreement did not operate in general restraint of trade, the total amount of purchases and sales

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remaining constant, so far as the complaint shows. It did, no doubt, operate in partial restraint of trade, viz. to restrain some part of plaintiff's trade in the watch cases it manufactured. But it does not follow that such restraint was unreasonable, nor heavier than the interest of the favored party required. An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or to sell to any one with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is "devoted to a use in which the public has an interest"; and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468. It is a business device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise, "My goods are for sale only to those who will buy from me exclusively, not to others." And the case is in no way different if a half a dozen individuals combine into a partnership, or an hundred individuals combine into a corporation, and adopt the same method to enlarge their business. If this be so,—and no authority to which we are referred holds to the contrary,—it is difficult to see in what respect it is unlawful for a score of different manufacturers to enter into a like arrangement to push the sales of their own goods, or to secure some business benefit to themselves by increasing the number of their exclusive customers, when there is nothing to show that the parties so combining constitute substantially all, or even a majority, of the manufacturers of such goods, even in the half dozen states where their factories are located, and when the field for manufacture is open to all. It is not an unlawful business enterprise for sellers to seek to secure the entire trade of individual buyers, and an agreement between sellers, who

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wish to confine their dealings to such buyers only, not to sell to others, is not an unfair or unreasonable measure of protection for such trade. Nor can it be claimed that such an agreement between sellers who represent but a part of the trade is injurious to the public, which has all the rest of the trade to deal [646] with. "Unless an agreement involves an absorption of the entire traffic, * * * it is not objectionable to the statute [of 1890]. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least." *U. S. v. Nelson*, 52 Fed. 646. It is difficult to see wherein the agreement complained of is injurious to the public. Certainly it is not one in general restraint of trade. It seems to be a reasonable business device to increase the trade of one set of competitors at the expense, no doubt, of their business rivals, who are equally free to avail of similar devices to secure their own trade. As such it is not obnoxious to the statute. The agreements or contracts complained of being not unlawful, the giving notice to the world of their existence is no offense. The judgment sustaining the demurrer should be affirmed.

SHIPMAN, Circuit Judge (concurring).

I concur with Judge LACOMBE in the conclusion that the circuit court properly sustained the demurrer of the E. Howard Watch & Clock Company in the above-entitled cause. I am not now prepared to adopt, as a reason for that conclusion, what I understand to be Judge LACOMBE's opinion, that the agreement and conduct of the combined defendants, which are set forth in the complaint, do not constitute a violation of the first or second sections of the act of July 2, 1890. My reason for regarding the complaint as demurrable is the more technical one that the allegations in regard to the acts which the defendants committed, or in regard to the facts which are charged to have existed, do not show that the defendants restrained any interstate commerce, or monopolized any part of such trade or commerce. What the statute struck at was "combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations" (*U. S. v. E. C. Knight Co.* [Jan. 21,

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1895] 15 Sup. Ct. 249), but it will not be contended that section 7 of the statute gives a cause of action to any person against another person who had merely planned to commit or unsuccessfully attempted to commit the prohibited acts. The illegal contract or attempted monopoly must have resulted in an injury of some sort to the plaintiff's interstate business. It should therefore appear directly, and not by way of inference, that the acts of the defendants, or their attempts to monopolize interstate commerce, resulted in its restraint or monopoly, to the plaintiff's injury. *Hutchins v. Hutchins*, 7 Hill, 104. "An action will not lie for the greatest conspiracy imaginable if nothing be put in execution, but, if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action." *Savile v. Roberts*, 1 Ld. Raym. 378. The important allegations in regard to the conduct of the combined defendants and the results of the acts are that the complainant owned an extensive watch-case manufactory in Kentucky, and subsequently in Ohio, and had the capacity to manufacture and offer for sale 25,000 watch cases per month, and that before November 16, 1887, it sold all of said [647] goods to a great number of dealers throughout the United States and Canada. It may be admitted that this substantially alleges that the complainant engaged in interstate commerce. It is also alleged that the defendants agreed, on or about said day, that they would not thereafter sell any goods manufactured by them to any person who should buy or sell any goods manufactured by the complainant, and that the many dealers in watch cases throughout the United States and Canada, and that many of the complainant's existing and previous customers, were notified of this agreement; that upon receipt of such notice a large number of the then and theretofore purchasers of the plaintiff's watch cases withdrew their patronage, and ceased thereupon entirely to purchase or deal in any wise in plaintiff's goods; that all the acts of the defendants were done and performed for the purpose of establishing a monopoly in the supply of watches to the public, contrary to the policy of the law, and in violation of the statutes of the state of New York and of the United States. But the residence of no withdrawing customer is alleged. No interference with in-

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terstate commerce is shown, except by inferring that some of the withdrawing customers lived in another state than Ohio; and, if they had bought the complainant's goods, interstate transportation would have taken place. The general allegation that the acts done in pursuance of the compact of November 16, 1887, and before the passage of the act of 1890, were done for the purpose of establishing a monopoly in the supply of watches, in violation of the statutes of New York and of the United States, is not an allegation that the acts restrained, or that the attempt actually monopolized, interstate trade or commerce.

It is next alleged that after the passage of the act of July 2, 1890, "all the former purchasers and dealers in said plaintiff's watch cases and other dealers in watch cases were, as plaintiff is informed and verily believes, ready and willing to buy large quantities of said plaintiff's goods, and this plaintiff would have at once regained all the business and the profits whereof it had been deprived by the acts aforesaid of the defendants, but that said defendants, after the passage of the said act of congress, ratified, confirmed, renewed, and continued the contracts, agreements, and combinations hereinbefore alleged, and in like manner, and with the same intention as hereinbefore alleged, served notices of their said ratification, confirmation, renewal, and continuance of the said agreements and combinations upon all said dealers in plaintiff's watch cases, whereby said dealers have continued to this day, forced by said renewal threats of defendants, and compelled thereby, and not otherwise, to refuse to purchase plaintiff's watch cases, or to deal in any wise therein." The allegation is that the former purchasers and dealers, who were intimidated by the previous notices, and who had stopped purchasing, continued, in consequence of the new notice, to be intimidated, and were forced by the renewed threats to refuse to purchase the plaintiff's watch cases. The names of the states in which these intimidated persons resided are not given. No new diversion of trade and no [648] new interference with interstate commerce are alleged. Admitting that the complaint sufficiently avers renewed acts of the defendants, there is the same absence of allegation that any customer, old or new, outside of the state of Ohio, refused to purchase, or that

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interstate commerce was interfered with. The complaint was, of course, not based upon the theory in the pleader's mind that the statute prohibited an attempted monopoly and a consequent injury, whether the trade or commerce monopolized was domestic or interstate, but he seems to have been cautious in regard to averring that the attempted monopoly had affected interstate commerce. Where a plaintiff declares upon a statute, especially upon one penal in its character, imposing, as this one does, three times all actual damages as a punishment for offenses against its provisions, his complaint should contain explicit averments, which would, if not controverted, bring his cause of action within the provisions of the statute. The pleader in this case has failed to thus aver that trade between the states or with foreign countries has been restrained by action of the defendants, and the judgment of the circuit court sustaining the demurrer should, in my opinion, be affirmed.

WALLACE, Circuit Judge.

I agree with the majority of the court that this action must be deemed to be founded upon the act of congress of July 2, 1890, and that the demurrer to the complaint was well taken unless the complaint sets forth a cause of action given by that statute. I dissent, however, from the conclusion that the complaint does not set forth such a cause of action. Briefly stated, the averments of the complaint are that prior to the time of the enactment of the statute the plaintiff was engaged in manufacturing and selling watches in the states of Ohio and Kentucky, having a market therefor throughout the United States, and selling its goods to a great number of dealers in other states; that the defendants, also manufacturers of watches, had agreed among themselves to maintain an arbitrary fixed price for all their goods; that thereafter, in order to compel plaintiff to join them in that compact, and prevent it from selling its goods unless it did so, the defendants combined in an agreement not to sell any watches made by any of them to any dealers who should thereafter buy of the plaintiff, and notified the dealers in watches throughout the United States of the agreement; that thereafter the de-

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fendants did refuse to sell such dealers as had bought of plaintiff, and thereby they prevented a great number of dealers from buying of plaintiff, and effected a complete boycott of its trade; and that, after the statute was passed, the same combination and acts were renewed and continued by the defendants, with the malicious purpose, and with the result, of suppressing plaintiff's trade. The complaint does not explicitly allege that this combination was entered into or these acts were done by the defendants for the purpose of preventing the plaintiff from selling to customers in other states; but from the facts alleged the conclusion is irresistible that this purpose was comprehended in the [649] conspiracy of the defendants, and the law presumes that they contemplated the ordinary and natural consequences of their acts. The statute declares various acts affecting trade or commerce among the several states or with foreign nations criminal, some of them being acts which are not criminal at common law. It also gives a civil remedy, cognizable by the federal courts, to any person or corporation injured by reason of such acts. The statute can have no application to acts affecting purely infra-state trade,—the commerce only between citizens of the same state,—not only because its language does not permit it, but because the power of commercial regulation given to congress by the constitution is restricted to interstate commerce, foreign commerce, and commerce with the Indian tribes. By one section it declares it to be a misdemeanor to monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the trade or commerce among the several states or with foreign nations; by another it declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of such trade or commerce. The same punishment is affixed to each of the different offenses. The questions in the case are whether such a combination or conspiracy as is set forth in the complaint operates upon interstate trade or commerce, and whether it is in restraint of trade, within the meaning of that term as used by congress in the statute. I cannot doubt that a combination intended and adapted to strangle the trade between the dealer who sells his goods in one state and his customers in other states of the Union who

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buy them,—a trade which necessarily involves the transportation of the goods from one state to another,—is intended and adapted to affect interstate commerce, and is, therefore, within the scope of the prohibition of the statute. The power of regulation is not confined to commerce which begins with the transit of goods, but operates upon all commerce of which the transit is an ordinary incident. This is illustrated by the legislation of congress in regard to trade-marks. The original trade-mark statute was held to be void because it was intended to embrace trade-marks used in infra-state commerce as well as in interstate commerce. *Trade-Mark Cases*, 100 U. S. 22. Thereupon congress passed another statute protecting trade-marks used in commerce with foreign nations or with the Indian tribes. In conferring jurisdiction of suits to protect such trade-marks upon the federal courts congress declared that such courts should not take cognizance unless the trade-mark in controversy “is used on goods intended to be transported to a foreign country,” thus plainly indicating an intention to give a remedy although the trade-mark has not been used upon goods actually transported or in course of transportation. See *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145. It has been repeatedly said in the opinions of the supreme court that commerce among the states, as that term is used in the constitutional provision which vests in congress the power of regulation, includes the buying and selling of commodities, and the transportation incidental thereto. *County of Mobile v. Kimball*, 102 U. S. [650] 691-702; *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 196-203, 5 Sup. Ct. 826; *Kidd v. Pearson*, 128 U. S. 1-20, 9 Sup. Ct. 6. The Knight Case does not disaffirm the proposition, but reiterates it. What the Knight Case decides is that a combination to control the manufacture of a product within a single state is not in restraint of interstate commerce, notwithstanding the fact that such commerce may be indirectly affected by it. The court say that the fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. But the court also

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used this language: "Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and instrumentalities, and articles bought, sold, or exchanged, for purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce." The acts charged against the defendants are intended and adapted to impinge upon the "contracts to buy, sell, or exchange goods to be transported among the several states," made and to be negotiated by the complainant with its customers in other states; and it cannot matter whether those contracts are negotiated in the state where the goods were produced or in the state where the customers of complainant reside.

Are the acts charged in restraint of trade? The primary purpose of the conspiracy set forth was doubtless to compel the plaintiff to join in a compact with the other defendants to maintain an arbitrary price or scale of prices for their goods, or otherwise to drive the corporation out of business; but its legitimate and necessary result was to likewise deprive dealers in watches generally, carrying on their business in many states, of the untrammelled exercise of their right to buy from the plaintiff. The books are full of cases in which a covenant not to carry on a business or vocation has been declared to be in restraint of trade, although the contract was only to restrict the covenantor. As is said in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173: "The illegality of contracts affecting public trade appears in the books under many forms. The most frequent is that of contracts between individuals to restrain one of them from performing a business or employment." So conspiracies aimed at the trade or occupation of a single person have not only been declared civilly actionable, but criminal, because affecting the public as well as the immediate individual. In the early case of *Rea v. Eccles*, 3 Doug. 337, the indictment alleged that the defendants had conspired to "deprive and hinder" one "from following and exercising" his trade as a hatter; and Lord Ellenborough alluded to it as one for conspiracy "in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public." *Rea*

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v. *Turner*, 13 East, 228, 231. Doubtless, in prohibiting contracts or combinations in restraint of trade it was the intention of congress to prohibit only those which were previously recognized at common law as belonging to that category, and not to prohibit [651] any which only effect a reasonable restraint. Such contracts or combinations as operate only in partial restraint of trade, are made for a just and honest purpose, and are for the protection of the legitimate interests of the parties, are consistent with the public convenience and the general welfare. And it is undoubtedly true that the tendency of modern judicial opinion is to regard with more liberality than formerly prevailed all contracts or combinations which are designed to protect parties from unnecessarily injurious competition, even though their indirect results may be to subject the public to a monopoly. I do not think the combination set forth in the complaint can be approved upon any such considerations. No body of manufacturers is justified in combining to coerce a competing manufacturer to join them and sell his goods at a price to be fixed by them, and to destroy his business in the event of his refusal to do so; and it matters not that they propose to destroy his business by peaceful methods of influencing his customers not to deal with him. "Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent." *Morris Run Coal Co. v. Barclay Coal Co.*, *supra*. "Any one man, or any one of the several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase." *State v. Glidden*, 55 Conn. 46, 8 Atl. 890. "Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind." *State v. Stewart*, 59 Vt. 273, 9 Atl. 559. The weight of authority supports the proposition that a combination is not only actionable, but is a criminal conspiracy, whenever the act to be done has the necessary tend-

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ency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of confederates, and giving effect to their purposes, whether of extortion or of mischief. The doctrine of some of the adjudications that a conspiracy is not criminal unless its object is to compass some criminal purpose, or some purpose not criminal by criminal means, is not the prevailing opinion. It suffices to quote the language of Chief Justice Shaw in *Com. v. Hunt*, 4 Metc. (Mass.) 111, 123, as follows:

"Without attempting to review and reconcile all the cases, we are of opinion that, as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. We use the terms 'criminal or unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy and punishable by indictment."

The statute upon which this action is founded discriminates between combination and conspiracy, and it not only makes both [652] criminal, but it makes contracts in which there is no element of a conspiracy or combination also criminal if in restraint of trade. It is therefore quite immaterial whether the acts charged in the complaint are sufficient to constitute a criminal conspiracy at common law. It suffices if the combination set forth is oppressive in its nature, and mischievous in its effects. I do not question the right of the defendants to combine for their own protection against unfair competition, and in that behalf, their commodity not being one of prime necessity, to agree not to sell to those who do not buy exclusively of them, or who buy of the complainant or some other obnoxious competitor; but I repudiate the doctrine that they can combine to induce the customers of a rival manufacturer not to deal with him unless he will join their combination. Upon the averments in this complaint, which are of course to be taken as true for the purposes of the demurrer, this case is one in which the defendants are acting not from motives of self-protection, but oppressively, and are actively concerting to destroy the business of a rival by inducing other dealers not to trade with him because he will not sell his goods at their prices. In

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People v. Fisher, 14 Wend. 1, the defendants were indicted under a statute making it criminal for two or more persons to conspire to commit any act "injurious to trade or commerce." They were journeymen shoemakers, and had concerted together to fix the price of making coarse boots, agreeing that if a journeyman shoemaker should make any such boots at a compensation below the rate established he should pay a penalty, and, if any master shoemaker should employ a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment. In sustaining the indictment, and declaring such acts criminal, the court used this language:

"The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that another mechanic shall not make them for less. The cloth merchant may say that he will not sell his goods for less than so much per yard, but has no right to say that another merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object are injurious not only to the individual particularly oppressed, but to the public at large. * * * The interference of the defendants was injurious not only to the individual particularly oppressed, but to the public inconvenience and embarrassment."

This language exactly fits the present case. For these reasons I think the complaint states a good cause of action, and the judgment sustaining the demurrer should be reversed.

[130] NATIONAL HARROW CO. v. QUICK ET AL.*

(Circuit Court, D. Indiana. March 23, 1895.)

[67 Fed., 130.]

MONOPOLIES AND COMBINATIONS—CONTROL OF PATENTS—PUBLIC POLICY—EQUITY.—A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows," to grant licenses to the assignors to use the patents upon payment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents, is an illegal combination, whose pur-

* Rehearing denied April 13, 1895; affirmed by Circuit Court of Appeals May 4, 1896 (74 Fed., 236), but the question of unlawful combination was not considered.

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poses are contrary to public policy, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof.*

PATENTS—INVENTION—PRIOR ART—SPRING-TOOTH HARROWS.—The Reed patent, No. 201946, for improvements in spring-tooth harrows, consisting substantially in the adjustment of a curved tooth to a curved seat on the harrow frame, and fastened thereto by a curved clip having biting edges, *held* valid, in deference to prior decisions sustaining the same, although the court was of opinion that, in view of the prior state of the art, no invention was displayed; but *held*, further, that the patent should be limited to the very terms of the specifications and claims, and that it is therefore not infringed by harrows made in accordance with the Miller patent, No. 444248.

This was a bill by the National Harrow Company against Frank Quick and E. Lindahl for infringement of a patent relating to spring-tooth harrows.

N. H. Stuart and Howard & Roos, for complainant.

V. H. Lockwood, for defendants.

BAKER, District Judge.

This is a bill in equity to recover damages, and to restrain the alleged infringement of letters patent No. 201946, issued April 2, 1878, to Dewitt C. Reed, for alleged new and useful improvements in harrows, which complainant now holds by divers mesne assignments.

The defenses interposed and relied on at the hearing are: (1) That the complainant is a combination or trust attempting to hold and use its naked legal title as assignee for purposes contrary to public [131] policy, and that a court of equity ought not to aid its unlawful purposes by entertaining the present bill; (2) that the alleged improvements secured by the patent do not involve invention; (3) that the defendants do not infringe.

The complainant is a corporation purporting to be organized under the laws of the state of New Jersey. The purpose of its organization, as shown by the proofs, is to become the assignee of all the patents held by the different

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corporations and business firms in the United States which are engaged in the manufacture and sale of spring-tooth harrows; to grant licenses to such corporations and firms to use the patents so assigned upon the payment by them of a royalty of one dollar for each harrow manufactured and sold; to take charge of all litigation of its licensees in relation to such patents, and to prosecute all infringements of any patent so assigned; to pay all costs and expenses of such litigation; and to fix and regulate the price at which such harrows shall be sold by its licensees. The complainant corporation is not organized for the manufacture and sale of harrows under the patents assigned to it, nor has it ever engaged in their manufacture and sale. A majority of all the corporations and firms engaged in the manufacture and sale of spring-tooth harrows in the United States have assigned the patents owned by them, respectively, to the complainant, and have received from it licenses to manufacture and sell harrows under the patents severally assigned by them to it. The patent in suit is one of those so assigned to the complainant by D. C. & H. C. Reed & Co., who have received an exclusive license from the complainant to manufacture and sell harrows under that patent practically in all the territory covered by it. So far as I can perceive, the complainant is organized to receive assignments of the legal title of harrow patents, to grant back licenses to their assignors to use and enjoy the same, to collect from each member of the combination or trust one dollar as a license fee for each harrow manufactured and sold, to regulate and control the price at which harrows may be sold by the members of the combination, and to prosecute and defend all suits involving the alleged infringement of such assigned patents.

It seems to me that such a combination is illegal, and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations, composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and, by their aggregate power and influence, imperil

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the free and pure administration of justice. *Strait v. Harrow Co.* (Sup.) 18 N. Y. Supp. 224; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155.

Complainant says that its title to the patent in question is valid, and that it has a lawful right to its protection from invasion by a stranger, regardless of the objects and purposes of the combination which it represents. On the other hand, the defendants contend that to give its title protection would be to give aid to the unlawful pur- [132] poses of the combination. In suits at law it is doubtless true, as a general proposition, that a wrongdoer will not be permitted to dispute the legal title of one in possession of money or property by showing that the title thereto was unlawfully acquired, or that the owner intends to apply it to an unlawful use. I have strong doubts whether this rule ought to apply to a suit in equity, where nothing but clean hands and a good conscience will move the court to act. The combination represented by the complainant is not illegal in any other sense, except that the law will not lend its aid to the accomplishment of its purposes. The common law does not prohibit the making of such combinations. It merely declines, after they have been made, to recognize their validity, by refusing to make any decree or order which will in any way give aid to the purposes of such combinations. It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts, or monopolies. They have already grown to alarming proportions, and courts, to the full extent of their powers, ought to discountenance and repress them.

Turning to the patent in question, we find that the "invention relates to improvements in harrows, and more particularly to that class of harrows wherein the teeth are spring teeth or of bow form." It "consists more particularly in a novel means for adjusting the said tooth so as to give to its point a greater or less depth of cut, which is effected

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by making that portion of the tooth which is adjacent to the frame curved and resting on a curved seat, and securing it thereto by a clip or its equivalent, by the loosening of which the tooth may be thrown forward or pushed back beneath its fastening, thus lowering or raising its point. The cross-bar or loop portion of the clip is formed concave upon its underside, and with a concavity greater than the corresponding portion of the harrow tooth; so that, when brought down to a firm bearing upon the tooth, this cross portion of the clip will find a firm bearing at its edges upon its curved seat. Instead of employing a continuous clip, that part resting upon the tooth may be simply a bar or plate perforated at its ends for the passage of bolts, which bolts are drawn snugly by nuts upon the other side of the frame. So, also, a plate might rest upon the harrow tooth, and be held in its place by an ordinary clip, of uniform dimensions throughout, the plate not being perforated, but simply grooved along that portion where the clip passes, in order to hold the clip in its place. Other forms will readily suggest themselves, the principal feature of my invention being that the tooth shall rest upon a curved seat, and be capable of being adjusted longitudinally through its said seat, and thereby either elevate or depress its working point. I am aware that it is not new with me, broadly considered, to adjust a harrow tooth longitudinally upon its frame, so as to vary the depth of the cut thereof, and hence I do not include the same in my invention. What I claim is: (1) The combination, with a harrow frame and harrow tooth secured thereon, [183] so as to be longitudinally adjusted, of a fastening clip formed as described, whereby only its two transverse edges have a bearing against the tooth, substantially as set forth. (2) The combination, with a harrow frame provided with a curved seat, of a curved tooth and clip or its equivalent, D, substantially as and for the purposes described."

The patentee does not claim the curved tooth, nor the curved seat, nor the curved or concave clip with its biting edges, nor the longitudinal adjustability of the harrow tooth upon its frame, as his invention. Each of these elements was old and well known. The problem which he proposed to himself was to adjust a curved tooth to a harrow beam so that

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it could be readily moved in the direction of its length, and thus elevate or depress the point of the tooth. The invention consists in resting the harrow tooth upon a curved seat, and fastening it in place with an adjustable curved or concave clip having biting edges. In view of the prior state of the art, disclosed in the record, and which may be found fully set out in *Reed v. Smith*, 40 Fed. 882, I am of the opinion that the adjustment of a curved tooth to a curved seat on the harrow frame, and fastened thereto by a curved clip having biting edges, does not amount to invention. It seems to me that a skillful mechanic, familiar with the construction of harrows, could have devised the method of adjusting and fastening the tooth covered by the patent by the simple exercise of mechanical skill. While such is my opinion, I feel bound to hold this patent to be valid out of deference to many former adjudications in which it has been sustained. It ought not, however, to receive a construction broader than the very terms of the specification and claims require.

As said in *Reed v. Smith*, supra :

"We find it impossible to escape the conclusion that the clip, which lies at the foundation of the plaintiff's patent, is limited to a curved clip with biting edges, designed to hold the tooth rigidly to its seat."

The patent then embraces a curved clip, having biting edges, in connection with a curved tooth and a curved seat for the same. The specification declares that "the principal feature of the invention is that the tooth shall rest upon a curved seat."

The defendants are alleged to have infringed by the sale of harrows manufactured under letters patent No. 444248, dated January 6, 1891, issued to Huson V. Miller for an alleged improvement in spring-toothed harrows. In this patent the harrow beam has a channel crossing its underface, in which channel a flat metal plate is fastened by a pin, and the tooth is placed in the channel, and rests against the metal plate at its outer edges, and is fastened by an ordinary flat clip, which comes in contact with the tooth at a point situated centrally in relation to the edges of the plate, and upon its convex side. When the clip is drawn down upon the convex side of the tooth, it presses the concave side of the

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tooth firmly upon the outer edges of the plate, thus holding the tooth in place. The tendency of the pressure of the clip is to slightly elevate the point of the tooth. While the result produced by each device is the same, [134] the means used to produce it differ. In the defendants' device the tooth does not rest on a curved seat, nor is it held in place by a curved clip having biting edges. The patent office evidently considered the difference between the two devices so substantial that the Miller patent was not regarded as an infringement of the complainant's patent.

In view of the narrow construction which I feel constrained to put upon the complainant's patent, I do not regard the Miller patent as embodying an infringing device; and, as that device is the one used in the harrows sold by the defendants, they cannot be held liable for infringement. The bill is therefore dismissed for want of equity, at complainant's costs.

[698] UNITED STATES *v.* CASSIDY ET AL.

(District Court, N. D. California. April 1 and 2, 1895.)

[67 Fed., 698.]

CONSPIRACY TO COMMIT OFFENSES AGAINST THE UNITED STATES—REV.

St. § 5440.—The statute relating to conspiracies to commit offenses against the United States (Rev. St. § 5440) contains three elements, which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy.^a

SAME—CONSPIRACY DEFINED.—A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone v. U. S.*, 13 Sup. Ct. 542, 148 U. S. 208, cited.

SAME—MANNER OF CONSPIRING.—The common design is the essence of the charge; but it is not necessary that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writ-

^a Syllabus and statement copyrighted, 1895, by West Publishing Co.

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ing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design.

SAME—PARTIES TO CONSPIRACY.—Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.

SAME.—Any one who, after a conspiracy is formed, and who knows of its existence joins therein, becomes as much a party thereto from that time as if he had originally conspired. *U. S. v. Babcock*, Fed. Cas. No. 14487, 3 Dill. 586, cited.

SAME—EVIDENCE—ACTS OF ONE PARTY.—Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the conspiracy.

SAME—DECLARATIONS BY PARTIES.—Any declaration made by one of the parties, during the pendency of the illegal enterprise, is not only evidence against himself, but against all the other conspirators, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution.

SAME—CONSPIRACY AS DISTINCT OFFENSE.—The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy to commit crime requires an additional restraint to those provided for the commission of the crime itself. It therefore makes criminal the conspiracy itself, with penalties and punishments distinct from those it attaches to the crime which may be the object of the conspiracy.

SAME—MEANS CONTEMPLATED—ALLEGATIONS AND PROOFS.—It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose.

SAME—OVERT ACTS.—While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in pursuance of the conspiracy

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is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S. v. Thompson*, 31 Fed. 331, 12 Sawy. 155, cited.

SAME—It is not necessary, however, to a verdict of guilty, that the jury should find that each and every one of the overt acts charged in the indictment was in fact committed; but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy.

OBSTRUCTING THE MAILS.—REV. ST. § 3995.—Although the law, which now appears in Rev. St. § 3995, and which makes it an offense to obstruct and retard the passage of the United States mails, was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (March 8, 1825), yet it is equally applicable to the modern system of conveyance and protects alike the transportation of the mail by the "limited express" and by the old-fashioned stagecoach.

SAME—The statute applies to all persons who "knowingly and willfully" obstruct and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S. v. Kirby*, 7 Wall. 485, cited.

SAME—The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S. v. Kirby*, 7 Wall. 485, cited.

SAME—MAIL TRAINS.—A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car as a part of its regular make up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense that the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S. v. Clark*, Fed. Cas. No. 14805, 23 Int. Rev. Rec. 306, followed.

SAME—Any train which is carrying mail, under the sanction of the postal authorities, is a mail train, in the eye of the law.

SAME—INTENT.—It is not necessary that defendants should be shown to have had knowledge that the mails were on board of a train which they have detained and disabled. On the contrary, they are chargeable with an [700] intent to do whatever is the reasonable and natural consequence of their acts; and as the laws make all railways postal routes of the United States, and it is within every

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one's knowledge that a large portion of the passenger trains carry mail, it is to be presumed that any person obstructing one of those trains contemplates, among other intents, the obstruction of the mail. *U. S. v. Debs*, 65 Fed. 211, followed.

COMBINATIONS TO OBSTRUCT INTERSTATE COMMERCE—ACT JULY 2, 1890.—The word "commerce," as used in the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, and in the constitution of the United States, has a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.

SAME.—While the primary object of the statute was doubtless to prevent the destruction of legitimate and healthy competition in interstate commerce, by the engrossing and monopolizing of the markets for commodities, yet its provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation of such commodities and persons from one state to another. *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 995, cited.

SAME—PULLMAN CARS.—Pullman cars in use upon railroads are instrumentalities of "commerce." *U. S. v. Debs*, 64 Fed. 763, cited.

CONSPIRACIES—COMBINATIONS OF RAILROAD EMPLOYEES—UNIONS AND PROTECTIVE ASSOCIATIONS—STRIKES.—The employes of railway companies have a right to organize for mutual benefit and protection, and for the purpose of securing the highest wages and the best conditions they can command. They may appoint officers, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. But it is unlawful for them to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party, for the purpose of injuring that third party. *Thomas v. Railway Co.*, 62 Fed. 817, followed.

SAME.—A strike, or a preconcerted quitting of work, by a combination of railroad employes, is, in itself, unlawful, if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the states.

CRIMINAL LAW—REASONABLE DOUBT.—A reasonable doubt is one arising out of the evidence; not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved,—a doubt for which a good reason can be given, which reason must be based upon the evidence or want of evidence.

SAME—PROVINCE OF JURY—CREDIBILITY OF WITNESSES.—The jury are the exclusive judges of the credibility of the witnesses. A witness

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is presumed to speak the truth, but this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives, and by contrary evidence. But the power of the jury to judge of the effect of evidence is not arbitrary; it must be exercised with legal discretion, and in subordination to the rules of evidence.

This was an indictment against John Cassidy, John Mayne, and others, under Rev. St. § 5440, for conspiracy to commit offenses against the United States, namely, the offense of obstructing the [701] mails of the United States, and the offense of combining and conspiring to restrain trade and commerce between the states of the Union and with foreign countries. The prosecutions grew out of the great Pullman strike, which occurred during June and July, 1894, and which was mainly supported and carried on through the organization known as the "American Railway Union." The charge delivered by Judge Morrow in this case is believed to be the longest ever delivered in a criminal case in this country, and only exceeded in any case by the charge of Lord Chief Justice Cockburn in the Tichborne Case. While only two of the defendants were tried, the case was treated as a test case, both by the government and by the strikers, and it involved, as a practical result, the disposition of some 132 other cases. Most of the defendants were recognized leaders of the strike in California. The character of the charge—conspiracy to retard the United States mails and restrain interstate commerce—brought up the entire strike, so far as the Pacific coast was concerned. Two hundred and sixteen witnesses were examined, and the trial occupied five months, beginning November 12, 1894, and ending April 6, 1895. The testimony covered nearly 6,000 pages of typewritten matter, and was practically a record of all the incidents relating to the strike. The charge was delivered on April 1 and 2, 1895.

H. S. Foote, Special Assistant United States Attorney, and
Samuel Knight, Assistant United States District Attorney.

Geo. W. Monteith, for defendants.

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MORROW, District Judge (charging jury).

Gentlemen of the Jury: I congratulate you on the approaching termination of this case. For five months you have been required to give your constant, and, I might say, exclusive, attention to the daily proceedings in this court. The trial of the case has been protracted, but I am not prepared to say that any greater time has been occupied than was necessary, under the circumstances, to secure the testimony of the 216 witnesses who have appeared before you upon the stand. The nature of the charges against the defendants now on trial, covering, as they do, the whole field of the railroad strike of last summer in this district, necessarily involves the closest scrutiny into every feature of that affair. In this examination you have displayed a patient interest of such a commendable character as to call for the special acknowledgment of the court. You are, indeed, entitled to the gratitude of every good citizen of the community for the sacrifices you are making, and for the service you are rendering in the faithful performance of a public duty.

In submitting the case to your consideration, it becomes my duty to call your attention to the character of the charges against the defendants, and the provisions of law under which the prosecution is being conducted. It is the duty of the court to declare the law; it is your exclusive province and responsibility to apply the law so declared to the facts as you, upon your conscience, believe them to be established.

[702] The indictment contains two counts, which, in general terms, charge that the defendants conspired, combined, and agreed together, and with divers other persons, to obstruct and retard the passage of the United States mails, and the carrier carrying the same, and also that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States, and with foreign countries. The crime of conspiracy is based upon section 5440 of the Revised Statutes of the United States, which provides as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any

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manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment, in the discretion of the court."

To make this statute as clear to you as possible, I will call your attention to its three essential provisions. The first element is the act of two or more persons conspiring together; the second is to commit any offense against the United States; and the third is what is termed the "overt act," or the element of one or more of such parties doing any act to effect the object of the conspiracy. With respect to the first element, we find that a conspiracy has been described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. *Pettibone v. U. S.*, 148 U. S. 203, 13 Sup. Ct. 542. The common design is the essence of the charge, and while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows

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of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired. *U. S. v. Babcock*, 3 Dill. 586, Fed. Cas. No. 14487. Furthermore, where several persons are proved to have combined together for the same [703] illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of a co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.

The confederacy to commit an offense is the gist of the criminality under the law. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons, to commit crime, requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinctive from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong.

The second essential element in the offense described by the statute is the purpose of the conspirators to commit an offense against the United States. The indictment charges

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that the defendants conspired with others to commit two offense against the United States,—one to obstruct and retard the passage of the United States mail and the carrier carrying the same; and the other, that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States and with foreign countries. The first charge is based upon the provisions of section 3995 of the Revised Statutes, which provides as follows:

“Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars.”

This section of the Revised Statutes was originally section 9 of the act of March 3, 1825 (4 Stat. 104), and, having been passed prior to the introduction into the United States of the method of transporting mail by railroads, the phraseology of the law conformed to the conditions prevailing at that time, but it is equally applicable to the modern system of conveyance, and protects alike the transportation of the mail by the “limited express,” as it does the carriage by the old-fashioned stagecoach. There are, however, certain [704] provisions of law directed specifically to the transportation of the mail by railroad trains, to which I desire to call your attention.

Section 3964 of the Revised Statutes provides as follows:

“The following are established post-roads: * * * All railroads or parts of railroads which are now or hereafter may be in operation.”

Section 3, Act March 3, 1879 (20 Stat. 358), provides “that the postmaster general shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed.” Section 4000 of the Revised Statutes provides that:

“Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.”

There is still another provision of law applicable to the transportation of mails on the Pacific railroads, which is as follows:

“That the grants aforesaid are made upon the condition that said company shall * * * transport mails * * * upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the

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preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and all compensation for services rendered to the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid." Act July 1, 1862, to aid in construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, § 6 (12 Stat. 493).

Recurring, now, to section 3995 of the Revised Statutes, making it an offense to obstruct and retard the passage of the mails, and you will observe that the statute applies to those persons who "knowingly and willfully" obstruct and retard the passage of the mails, or the carrier carrying the same; that is to say, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the acts with the intention that such shall be their operation *U. S. v. Kirby*, 7 Wall. 485. "It would be no defense under this statute," said an eminent judge in a recent case, "that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment. *Thomas v. Railway Co.*, 62 Fed. 822.

The statute also applies to those persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, the intention to obstruct and retard the passage of the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S. v. Kirby*, *supra*.

The second offense, which, it is charged in the indictment, was the object of the conspiracy, was to restrain trade and commerce among the several states and with foreign nations. This offense is described in an act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209), which provides as follows:

[705] "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a mis-

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demeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile v. Kimball*, 102 U. S. 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826. Pullman cars in use upon the roads are instrumentalities of commerce. *U. S. v. Debs*, 64 Fed. 763. The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S. v. Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another. *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 995, 1000.

We come, now, to consider the third element involved in the crime of conspiracy, as it is declared in the statute under consideration; that is to say, the overt act, or the element of one or more of the parties to the conspiracy doing any act to effect its object. At common law, it was neither necessary to aver nor to prove an overt act in furtherance of a conspiracy. *Bannon v. U. S.*, 15 Sup. Ct. 467. The offense was complete when the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. It was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. *U. S. v. Walsh*, 5 Dill. 58, Fed. Cas. No. 16636. But, under the statute of the United States now under consideration, the doing of some act in pursuance of a conspiracy is an ingredient of the crime,

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and must be established as a necessary element of the offense, although the act need not be in itself criminal or amount to a crime. *U. S. v. Thompson*, 12 Sawy. 155, 31 Fed. 331.

With this general statement and explanation of the statute involved in this case, I will proceed to consider the allegations in the indictment, which, as I said before, contains two counts.

The first count charges that the defendants conspired both to obstruct and retard the passage of United States mails, and to unlawfully engage in a combination and conspiracy in restraint of trade and commerce, while the second count charges a conspiracy in re- [706] straint of trade and commerce alone. Otherwise, both counts are, in substance and form, identical. In general terms, the two counts charge: (1) Formation of the conspiracy; (2) legal corporate existence of the Southern Pacific Company, and its means, manner, and methods of transporting the mails and interstate commerce; (3) means conspired to be used in effecting the object of the conspiracy; (4) overt act charged; (5) concluding with an allegation of unlawful intent.

Bearing these general features of the indictment in mind, you will now be able to understand the meaning of the various allegations of the indictment, as I proceed to refer to them somewhat more in detail.

Taking up the first count: The formation of the conspiracy is alleged, and it is charged that John Cassidy, John Mayne, Fred Clarke, and James Rice, with divers others, names unknown, did conspire to obstruct and retard the passage of the mails of the United States, and to restrain trade and commerce among the several states and with foreign nations. (2) The legal corporate existence of the Southern Pacific Company, and its means, manner, and method of carrying the mails and interstate commerce, are set out. It is averred that the Southern Pacific Company was a railroad corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, express matter, and other commodities, comprising and constituting trade and commerce, within the meaning of the act entitled "An act to

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protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890." The lines of railroad over which it carried on its mail and interstate commerce; the manner and means employed and necessary to its doing so, viz. yards, depots, tracks, trains of cars, and other equipment suitable for the transportation of the United States mails, passengers, freight, and express matter, and other commodities,—are also set out. (3) Then follow the means conspired to be used in effecting the object of the conspiracy. These are, briefly: First. By forcibly taking and keeping possession and control of all yards, depots, tracks, and trains of cars upon said lines of railway, and by forcibly holding and detaining the same. Second. By causing to be assembled, and assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places upon said lines of railway, in said state and Northern district of California, to wit: 1. At the city and county of San Francisco. 2. City of Sacramento. 3. City of Oakland. 4. City of San José. 5. City of Stockton. 6. Town or Red Bluff. 7. Town of Dunsmuir, county of Siskiyou. 8. City of Vallejo, county of Solano. 9. Town of Lathrop, county of San Joaquin. 10. Town of Palo Alto, county of Santa Clara. By gathering in great numbers in said yards and depots, and other places, around, in, and upon the trains, cars and engines of the said Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains. Third. By threats, intimidation, personal assaults, and other force and violence, to prevent the engineers, firemen, conduct- [707] ors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating said engines, trains, and railways. Fourth. By forcibly disconnecting air brakes upon such trains,—mail, passenger, and freight. Fifth. By putting out the fires in the engines drawing the same. Sixth. By throwing switches, in order to prevent the passage of such trains through depots and stations. Seventh. By opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railway cars were situated. Eighth. By burning and destroying bridges, trestles, and culverts, over which such trains necessarily and usually

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would pass. Ninth. By loosening, removing, and displacing the rails of the tracks of said railroads. Tenth. By greasing the rails of the said tracks. Eleventh. By stopping trains upon railway crossings and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches. Twelfth. By compelling the employés of said railroad company to leave their trains, shops, and the work of said company, while in the performance of their duty. Thirteenth. By using all such other forcible means as to them should seem expedient to prevent, for an indefinite period, the use of the said railways for the transportation of the mails of the United States and interstate commerce.

It will be well to observe, at this point, that the indictment does not charge that the defendants did, in fact, use or put in operation the means herein set out, in effecting the object of the conspiracy; the charge is that such were the means conspired to be used for that purpose. Now, when you come to consider the testimony, you will probably find that some of it tends to show that certain persons did, in fact, use such means to prevent the movement of railway trains. This testimony was admitted, not to prove that such acts had been committed, but because of the relevancy of such testimony to the charge in the indictment,—that such means were to be used in effecting the object of the conspiracy. In other words, it tends to show that a conspiracy was formed to obstruct and retard the passage of the United States mails, and to restrain trade and commerce among the several states and with foreign nations, and that such means were to be used to carry the conspiracy into effect.

This brings us to a feature of this charge of conspiracy which you will bear in mind. It is not incumbent upon the prosecution to prove that all of the means set out in the indictment were, in fact, agreed upon to carry out the conspiracy, or that any of them were actually used or put into operation. It will be sufficient if it be established to your satisfaction, and beyond a reasonable doubt, that one or more of the means described in the indictment were to be used to execute that purpose.

After stating the means by which the conspiracy was to be effected, the indictment then sets out the overt acts; that is

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to say, it charges the doing of certain acts to effect the object of the conspiracy. They are as follows: That on the 6th day of July, 1894, the defendants, at Palo Alto, (1) forcibly took possession and control of the yards, depots, buildings, tracks, engines, and cars, and other appliances and [708] property, of the Southern Pacific Company: 1. By causing to be assembled, and assembling with, a large crowd of persons in said depots, buildings, and yards of the Southern Pacific Company; and by gathering with said crowds of persons in said depots, buildings, and yards, around, in, and upon the aforesaid trains, cars, and engines, and upon the tracks of the railways. 2. By threats, intimidations, personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employes of said company having charge of said depot, buildings, and other property, etc. It is further charged (2) that, on the 6th day of July, 1894, said defendants, at Palo Alto, forcibly and violently prevented the movement of all trains of the Southern Pacific Company, to, from, or through the town of Palo Alto: 1. By gathering in crowds, etc. 2. By placing physical obstructions upon said track. 3. By displacing the switches. 4. By forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employes, while engaged as aforesaid. 5. By uncoupling the cars of said trains and disconnecting the same. 6. By removing said cars from said tracks. 7. By withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein. 8. By displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails. 9. By other violent, forcible, and unlawful acts and means to the grand jurors unknown. It is further charged (3) that said defendants, at the time and place above indicated, unlawfully, forcibly, and violently occupied and held possession and control of said yards, depots, tracks, engines, trains of cars, and other appliances and property of the Southern Pacific Company, by the means aforesaid, and by said means excluded the Southern Pacific Company and its employes from the possession, use, and control thereof, and by said

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means prevented the movement of said trains from and including July 6 to and including July 10, 1894.

The same observation, which I have just made to you with respect to the establishing of one or more of the means alleged to have been concocted and conspired to be used, is applicable to the overt acts charged. It is not necessary to a verdict of guilty that you should find that each and every one of the overt acts charged have, in fact, been committed. If you are satisfied beyond a reasonable doubt that one or more of these overt acts have been committed, and that they were done in furtherance of the conspiracy alleged to have been entered into by and between these defendants, and to carry out or effectuate in some way the object of the conspiracy, that is all that the law requires. The indictment concludes with allegations of intent, viz.: That the defendants, by the acts and means aforesaid, knowingly and willfully obstructed and retarded the passage of the mails and the carrier carrying the same, and restrained interstate commerce from the 6th of July to and including the 10th day of July, 1894, at Palo Alto. The second count, as stated above, is confined to charging a conspiracy to restrain trade and commerce [709] alone; otherwise it is identical in form and substances with the count just elaborated upon.

Having directed your attention to the different provisions of law involved in the charges against these defendants, and having also stated to you, in brief terms, the several allegations of the indictment, you are now prepared to consider the testimony in the case in its proper light, for the purpose of determining the guilt or innocence of the defendants; but in referring to the testimony you will distinctly understand that you are the exclusive judges of the facts, and that it is not my province or purpose to intrude upon your jurisdiction in any particular or to any degree. If, in any of my rulings during the progress of this trial, I have appeared to indicate that any controverted fact has been established, or if I now assume or appear to consider or treat any fact as proved, unless it may be an admitted fact, you will disregard such assumption, and act entirely upon your own judgment and conscience in determining the facts of the case.

From what has been stated, it will appear to you that you

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are brought to the consideration of three questions which may be properly suggested to you as a guide for your deliberation: (1) Has the government proved the existence of a conspiracy alleged in the indictment? (2) If it did exist, were any of the alleged acts performed by one or more of the parties to the conspiracy? (3) If such a conspiracy existed, were the defendants parties to it?

Taking these questions in their order, you will first consider whether the conspiracy charged in the indictment has been established.

GENERAL CONSPIRACY.

This is the important question in this case, and is a question of fact for you to determine, subject to such rules of law as the court will give you to assist you in arriving at a correct conclusion. The evidence on this point is largely circumstantial, and involves a consideration of the acts of members of the American Railway Union; the course and methods of the association in boycotting the Pullman cars, and subsequently declaring a strike against the Southern Pacific Company; and, generally, the attitude and conduct of the strikers and those acting with them during the time the strike was in operation.

AMERICAN RAILWAY UNION.

The evidence tends to show that the American Railway Union is a fraternal organization, composed of railroad employes below a certain grade. The headquarters of the association are located at Chicago, Ill. In June and July last Eugene V. Debs was its president; Geo. W. Howard, vice president; and Sylvester Keliher, secretary. The union is divided up into local unions. In the constitution of the order, introduced in evidence, the principles and purposes, so far as they are pertinent to this feature of the case, are stated as follows:

"It is a self-evident truth that 'in union there is strength,' and, conversely, without union weakness prevails; therefore the central benefit to be derived from organization is strength,—power to accomplish that which defies individual effort. The American Railway Union includes all railway employes, born of white parents.

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organized within one great brotherhood. There is one supreme law for the order, one roof to shelter all, and all united when unity of action is required. The reforms sought to be inaugurated and the benefits to be derived therefrom, briefly stated, are as follows:

"First. The protection of members in all matters relating to wages and their rights as employes is the principal purpose of the organization. Railway employes are entitled to a voice in fixing wages and in determining conditions of employment. Fair wages and proper treatment must be the return for efficient service, faithfully performed. Such a policy insures harmonious relations and satisfactory results. The order, while pledged to conservative methods, will protect the humblest of its members in every right he can justly claim; but, while the rights of members will be sacredly guarded, no intemperate demand or unreasonable propositions will be entertained. Corporations will not be permitted to treat the organization better than the organization will treat them. A high sense of honor must be the animating spirit, and even-handed justice the end sought to be attained. Thoroughly organized in every department, with a due regard for the right wherever found, it is confidently believed that all differences may be satisfactorily adjusted; that harmonious relations may be established and maintained; that the service may be incalculably improved; and that the necessity for strike and lockout, boycott and black-list, alike disastrous to employer and employe, and a perpetual menace to the welfare of the public, will forever disappear.

"Second. In every department of labor, the question of economy is forced to the front by the logic of necessity. The importance of organization is conceded, but, if it costs more than a workingman is able to pay, the benefits to accrue, however great, are barred. Therefore, to bring the expenses of the organization within the reach of all is the one thing required,—a primary question which must be settled before those who stand most in need can participate in the benefits to be derived; hence to reduce the cost to the lowest practical point is a demand strictly in accord with the fundamental principles of economy, and any movement which makes it possible for all to participate in the benefit ought to meet with popular favor.

"Third. The organization will have a number of departments, each of which will be designed to promote the welfare of the membership in a practical way and by practical methods. The best thought of workmen has long sought to solve a problem of making labor organizations protective, not only against sickness, disability, and death, but against the ills consequent upon idleness and those that follow in its train. Hence there will be established an employment department, in which it is proposed to register the name of every member out of employment. The department will also be fully informed where work may be obtained. It is doubtful if a more important feature could be suggested. It evidences fraternal regard without a fee, benevolence without alloy."

Section 54 of the constitution of the American Railway Union (entitled "Laws of Protection") provides for what is called a "board of mediation," and defines its powers. It is as follows:

"The board of mediation of each local union shall elect a chairman. The chairman of the local board of mediation shall be a member of the general board of mediation of the system or line on which they are employed. The general board of mediation shall elect a chairman and secretary. The general board of mediation shall meet on

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the second Tuesday of September of each year at the headquarters of the road on which they are employed, for the transaction of such business that may emanate from the local board of mediation. All complaints and adjustments of a general character shall be handled by the general board of mediation. All complaints and adjustments must be taken up first by the local union; if accepted by a majority vote, it shall be referred to the local board of mediation for adjustment; and, if failing, the case shall be submitted to the chairman of the general board of mediation; failing in which, they shall notify the president of the general union, who shall authorize the most available member of the board [711] of directors to visit and meet with the general chairman of the board of mediation, and issue such instructions as will be promulgated by the directors."

The right of employes of railway companies to organize in this way for their own benefit and protection is not questioned. They are entitled to the highest wages and the best conditions they can command, and they may organize an association or union for that purpose. There is no controversy on this point. It is a benefit to them, and it is not prejudicial to the interests of the public, that they should unite in their common interests and combine for such lawful purposes. In *Thomas v. Railway Co.*, 62 Fed. 817, Judge Taft, in the circuit court of the United States for the Southern district of Ohio, speaking of the relation of railway employes to the American Railway Union, says:

"If they (the employes) stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employe may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, they may order them, upon pain of expulsion from their union, peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory."

This is clearly the law; but there is a just and reasonable limitation to the power and privilege of railway employes, even under the protection of such an organization. They are not entitled to interfere with the rights and property of others, and by force and intimidation compel a carrier of United States mails or of interstate commerce to suspend the operations of such necessary and lawful business; or, to

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state the proposition a little more exactly, they have no privilege or right to violate a law of the United States.

Now, with respect to the general charge of conspiracy contained in this indictment, I will direct your attention to some of the testimony which the government claims tends to establish that element of the case.

TIME WHEN THE BOYCOTT TOOK EFFECT.

It is admitted that in the latter part of June, 1894, a convention of the American Railway Union, assembled at Chicago, resolved to boycott the Pullman Company; this boycott to take effect in five days, should the difficulties existing between that company and its employes not be settled at the expiration of that period. On June 26, 1894, the president of the general union sent the following telegram, which was received by the American Union Lodge, known as "Local Union No. 310," having its headquarters in Oakland: "Pullman boycott in effect to-day noon, by order of convention." The telegram was signed by E. V. Debs, the president of the union. G. D. Bishop, secretary of local union No. 310, at Oakland, identifies [712] this telegram. The boycott was therefore declared at noon of June 26, 1894, which fell on a Tuesday.

Mr. Knox, who was an employe of the Southern Pacific Company at Sacramento, and a member of the American Railway Union at that place, being called as a witness for the defense, testified that he was chairman of the mediation committee; that the duties of the committee were to settle the differences between the employes and the corporation. He relates the circumstances connected with the commencement of the boycott, as follows:

"On the 26th of June we were asked to boycott the Pullman cars, and the union took action on it, and the mediation committee were ordered to call at Mr. Wright's office,—this was about 11:20 at night,—and notify him of the action of the union. Mr. Knox, Mr. Compton, and Mr. Mullen composed the mediation committee. We went down, and saw Mr. Wright, and told him what action the union had taken, and went back and reported again to the union. We were authorized then to lay off from our work, and to attend to this boycott; to notify the members, and the like. I went down and asked Mr. Halloran for leave of absence until the trouble was over with, and it was granted me. I was laying off at the time of the strike. Obtained leave of absence about two o'clock or 2:30 in the morning of the 27th

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of June. The object of the boycott was this: That the American Railway Union had a big lodge at Pullman, Illinois. The Pullman Company had reduced the wages of their employes so that they could hardly live. * * * Received a message from President Debs, asking us to boycott the Pullman cars, and the mediation committee went down to the depot after the meeting. We ordered the boycott. We decided to boycott Pullman cars. We were notified to go down and tell Mr. Wright of the action of the union, which we did. Then we reported back to the union again, and told them what Mr. Wright said, and, after that, the meeting was adjourned, and we went from there to the depot to carry out our instructions. We were given full power to act in the matter. When we got to the depot, or shortly after we arrived there, Mr. Halloran, the yardmaster, and Mr. Small, and several of the officials, showed up around there, and wanted to know what the trouble was. Mr. Halloran called me off to one side, and asked me, as a favor, not to ask the men to boycott the Pullmans on 2, 4, and 16. He said that if we did not wish to handle the Pullman cars, if we would agree not to call him a scab, he would switch the cars. After consulting with the balance of the mediation committee, it was decided to let the Pullman cars on 2, 4, and 16 go through to their destinations without boycotting them. We told him we would switch the cars instead of him. We did not ask him to do any work. On the morning of the 27th, about 8:30, I went through the shops,—there were a great many shopmen belonging to our union,—to see what action they had taken in reference to working on Pullman cars. I found a great many of the men idle. They were not working on the Pullman cars. We told them to go and complete their work; to never mind boycotting the work; to keep on with it. * * * After going through the shops, and notifying the men to keep on with their Pullman work, we then went back to the depot. There was a train due to leave there at 10:25 in the morning, known as 'No. 84.' She has a Pullman car off of No. 2, that comes from Chicago, and another one to put on there at Sacramento. There is a first-class car put on at Sacramento. The other is a tourist car. The one that came through from Sacramento was loaded and the other one was empty. We asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. We thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. Mr. Halloran then came to us, and said he would take the engine and go to couple on, and we should come up and ask him not to couple on, and tell him we did not want him to scab on us, and he would not couple on. With that understanding he took the engine, and went around on the track where the Pullman car was, and started to couple on. We went over, and told him we did not like to have the yardmaster [713] scabbing on us; it did not look well. He said, 'Of course, I will have to yield;' and he went up to the office, and asked us if we would go with him. We went with him. Mr. Jones asked him if he could not get some one else to put on the Pullman cars. He said, 'No; they are all A. R. U. men.' Mr. Jones said, 'Cannot you hire some one else?' He said, 'No; they are all A. R. U. men.' That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office, and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. They refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be no parties to holding the mail. He refused. We went to him, and asked him if he would not let this other Pullman car go on 104, because the passengers were very anxious to get through.

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He said they would, and they switched the loaded tourist car off of 84, and put it on 104. That is about all that happened on the 27th. * * * That train was made up at Sacramento. It runs between Sacramento and Oakland, by Tracy, and around that way. The Pullman cars go to Los Angeles. They carry the Pullmans down to Lathrop, and then they go to Los Angeles. The balance of the train comes into Oakland. It starts from Sacramento. The Pullman car, though, that goes through, that comes from Chicago,—that loaded one,—the tourist car. They sent it out on another train at night, 5:30. '104' it is called. Sent it out in the evening,—on the same day. There was nothing left of that train, then, except the mail, baggage, express, and passenger cars. There was no one in the passenger cars. They went off on the next train,—the passengers; the through passengers from Chicago that went on the next train. There were a good many of the local that went on the next train, too. That only runs to Tracy. It does not come clear around to San Francisco, but stops there. Know C. A. Newton. I had a conversation with him on the night of the 26th, and I might have had on the 28th. I would not say for certain. Had a conversation with him on the night of the 26th, at which I showed him a telegram. The telegram read: 'Boycott declared on Pullman cars. E. V. Debs.'

C. A. Newton, called for the United States, night yard-master at Sacramento, for the Southern Pacific Company, contradicts Mr. Knox on this point, and says that Mr. Knox handed him a telegram, which he read. That the telegram read: "H. A. Knox, Sacramento. Boycott declared against Pullman. Hold all Pullmans. E. V. Debs." That he handed the telegram back to Knox, who left the room where they had met, with the exclamation, "That is hell." The witness Knox further states:

"About 12:30, I think it was, on the morning of the 28th, I received a message from Los Angeles, saying that some men were discharged for refusing to handle Pullman cars, and saying that the Los Angeles Union had decided to strike for the reinstatement of those men, and asked us to participate in the strike. The committee having full power to act, we considered the matter, and came to the conclusion it was a just fight, and we would take it up and help them out. In that message from Los Angeles they asked us if we would notify all concerned, which we did. I went down to the depot, and that special that Mr. Newton was testifying about—the officers' special—was just pulling out of the depot. I had had a conversation with the engineer and the fireman before that, and they told me if there was any strike they wanted a finger in the pie, so I ran up and got on the engine, and told the engineer and fireman about what had occurred. They said, 'Well.' Some one stopped them; I don't know who. They were stopped from the hind end of the train, and they said, 'Cut us off, and we will go to the house,' so somebody cut the engine off. I don't know who it was. No one was with me on the cab of the engine,—only the engineer and fireman. Did not offer any threats or intimidation or violence. * * * The [714] engine was cut off, and the engineer was taking it around to the roundhouse. I was in the depot by that time. Mr. Wright wanted to know what was the matter with the special. I told him, as near as I could find out, the engineer was

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going to strike with us. He had Mr. Newton stop him there in front of the depot, and he had a conversation with the engineer, and they finally agreed to go on with the special, and asked us if we would couple on. We told him, 'Yes; if they wanted to go.' I told Mr. Wright I thought it was foolish for them to go. They would go just as far as Rocklin, and that was no place to stay. There were no accommodations there at all. He said, 'For God's sake, let them go out of Sacramento, if they don't get over the American river bridge.' I thought to accommodate him. We would not ask the conductor and brakeman to boycott the officers' special. We would let them go as far as Rocklin. I knew they would not get any further than that, because the men had already quit up there. I got on the engine, and rode up through Sixth street yard with them, to see that the switches were all set, and everything ready to go. I rode with the engineer on the engine. After I got back from Sixth street the committee then went up to the Western Union & Postal Telegraph Company, and we sent a good many dispatches notifying them that we had struck."

(These telegrams will appear further on.)

Newton testified as follows with relation to the special car,—or officers' special, as it was called,—and with reference to the statements made by Knox at the time:

"I know Mr. Knox personally. He used to work for me. Mr. Mullen, I knew him personally, too. Mr. Compton I did not know until after the strike. I saw Mr. Knox about the 26th of June. * * * The first train that came into the yard after that conversation I had with Mr. Knox (referring to above) was a special that came from Oakland. It got in about 12:25 on the morning of the 29th. It was a special passenger train, that ran out of its ordinary time. It was composed of two officers' cars and the engine. * * * Saw Mr. Knox on the arrival of the officers' train, a little while after it got in, when it got ready to leave. Knox came running through the depot and bellowed out: 'Stop that train! Stop that train! Not a son of a bitch of a wheel will turn on the system.' This was on the morning of the 29th, about 12:25."

This, it will be observed, flatly contradicts Knox as to what occurred at that time.

The witness Newton testifies further as to Knox's attitude, as follows:

"Did not have any direct conversation with Knox. When No. 3 came in, going east, there was quite a number of shopmen around there, standing in groups, I guess to the extent of forty or fifty. They came in charge of United States Marshal Long. This was along in the morning, about daylight, probably four o'clock, on the 29th. That was a mail train,—the regular Eastern overland,—the Atlantic express; the 'fast mail,' they call it. After No. 3 pulled out, the groups got moving towards the depot,—after she pulled out,—and some one in the groups made the remark to Mr. Knox why he did not hold the train,—what he let her go out for. He said he did not have force enough to hold her, but when seven o'clock came he would call out the shop men, and he would have force enough to hold anything that came along."

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"The strike was formally declared about 12:30 or 1 o'clock on the morning of the 29th of June by the Los Angeles Union. In Sacramento it was left in the hands of the committee. The committee had full power to act. The committee decided to strike to have those men in Los Angeles reinstated. As soon as they got the message they consulted probably for 25 or 30 minutes, and went on and did as requested by the message, to notify all those concerned. That was about 12:30 or 1 o'clock on the morning of June 29th. Had not at that time received any notification from Oakland. Did not act [715] on anything but the notification from Los Angeles. The members that were out on the road,—we notified all the unions along, Truckee, and Rocklin, and Dunsmuir, and all over the system,—we notified them that we had struck; that we had ordered a general strike in Sacramento, and those in Sacramento—the shop men—were all notified the next morning after they went to work, perhaps 8 o'clock or 8:30."

The attitude of the mediation committee, as representatives of the American Railway Union, is stated by Knox as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them that, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from,—Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did. Consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the gist of our conversation all the way through. It was repeated several times."

Again he says:

"I told Mr. Baldwin our men would not work on Pullman cars. That is all I told him. * * * We were doing nothing with reference to preventing the movement of trains; only quit work, that is all. * * * We were trying to induce the men that showed up to strike with us. That was the understanding between Mr. Wright and myself. * * * I told Mr. Baldwin that our men would not work on Pullman cars. Did not make the statement that we would not allow Pullman cars to move."

As to the power possessed by the mediation committee, Knox says:

"The committee had full power to act. The union had given them full power to act."

On cross-examination Knox testifies as follows:

"We discriminated between Pullmans that were full of passengers and Pullmans that were empty, on the 27th and 28th of June. After

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the strike was ordered, we did not. All Pullmans were treated alike, and everything else, except mail. It grew from the Pullman cars to every other form of cars except the mail cars. After those men were discharged it did; did not matter what the destination of the cars was. We thought that we could control the A. R. U. organization, and we did. Anything that we knew anything about we controlled their action, through the strike. Anything that was done by any of the officers of the A. R. U. organization during the strike was done with the full consent, and was under the policy of our organization, as far as Sacramento was concerned. We were given full power to act. That power has never been taken away from us yet. Had control on the 3d of July, but do not know whether there was an A. R. U. man who moved the Pullman cars on that day or not. Could not swear to it. I do not think there were very many of them.

It appears that on July 5th, and during the strike, Knox, Compton, and Mullen, of the mediation committee, appeared before the Citizens' Protective Association of Sacramento, and made a statement concerning the attitude of the American Railway Union. Cornelius C. Howell, who was present at the meeting, testifies as follows:

"Was in Sacramento the latter part of June and the early part of July last. I was employed by the Industrial Improvement & Manufacturers' As- [716] sociation of Sacramento. I was looking up manufacturers' industries to locate at Sacramento for that company or association. Became a member of the Citizens' Protective Association, I believe on the 3d of July. That association formed for to get together and see if they could not do something to open up the commerce connected with the city, and such other business as might be necessary, owing to the condition that things were in at that time from the cause of the strike that had been ordered on the 29th of June, or the strike that occurred on the 29th of June. I was secretary of the organization from the day that we organized, up until, I think, the 15th or 20th of July; somewhere along there. Performed the duties of secretary at meetings. Recollect a meeting held on or about the 5th day of July last. It was called by the association to see if they could not do something in order to open up the commerce. Members of the mediation committee of the A. R. U. were present at that meeting. They were Mr. Knox, Mr. Compton, and Mr. Mullen. After discussing the ways and means to adjust matters, it was decided that it would be better to bring these people before the association, this mediation committee, and find out the condition of affairs,—what the causes were of all the trouble,—and see if we could not do something to adjust matters; and in that connection it was agreed that we would admit them, and see what they had to say; they having, I believe, made a proposition to some member of the association that they would like to come before the association, as the mediation committee of the American Railway Union. They came before the meeting and made a statement. Parts of their statement were reduced to writing. This is a part of the record of the meeting of the Citizens' Protective Association held on the 5th of July. Not the entire statements, but I took down part of what they said, and then we dictated it out, and took the minutes to Mr. Knox in his room. Mr. Compton was present when I went there with the minutes. I asked him to read them over, and see if they were correct; that I did not wish to have them quoted as saying something before the association that they did not say, and,

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before they would become a part of the record, I wanted them to see if they were right. I read the minutes to them. These two were present at the time. They looked them all over; and wherever they wanted any changes made I run the pencil through them, as it appears here, and when they got through—they looked it all over and read it—I wrote this certificate attached, and Mr. Knox signed it, and Mr. Compton signed it, in my presence,—both of them in my presence. I left the paper with them so that they might show it to Mr. Mullen, another member of the committee. He returned, as I understand, after I left, signed the paper, and they sent it down to my office. We had offices in the same building. The interlineations or erasures were made just before that was signed, while Mr. Compton and Mr. Knox were standing at my side. I think they were made—in fact, I know—at the request of Mr. Knox. He did the talking."

This document reads as follows:

"SACRAMENTO, July 7th, 1894.

"When the committee returned and had introduced the mediation committee from the A. R. U. to the chairman, Mr. Katzenstein, he in turn introduced Mr. Knox, Mr. Mullen, and Mr. Compton to the association, and invited Mr. Knox to address the association, which he had come to meet. Mr. Knox, among other things, after thanking the association for allowing him to be heard, stated among the grievances that the original cause for this strike was on behalf of the wage-earners at Pullman, Illinois. Mr. Geo. Pullman had been grinding down his men with such small wages that it was impossible for them to get along. Mr. Knox went into detail as to treatment of the employes received at the hands of the Pullman Car Co., at Pullman, Ill. That through the president of the A. R. U. order he had declared a boycott against the Pullman cars, and to effectually accomplish the object he had ordered the strike, and it had now resolved itself to this: That the A. R. U. order, which he represented, demanded that Pullman restore his men in Chicago to their old places, with the same scale of wages paid to them in 1893; or that the S. P. R. Co. purchase the one-quarter ownership of the Pullman Co., paint out the Pullman name from the cars, and restore all the men on the railroad and in all shops to their old position and wages. Senator Cox inquired of Mr. [717] Knox if he did not think this committee of citizens could be interested to an extent that something might be done to adjust matters between them and the railroad. Mr. Knox said it had gone so far that nothing could be done until the whole question was settled, and that he had given his ultimatum. Mr. McClatchy asked Mr. Knox what condition affairs were in at this time or what the situation was. Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger cars or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with. Mr. Mullen said, in part, after Mr. Knox had taken his seat, that this was a fight between capital and labor, and that from the chief justice of the United States down through all the branches—judicial and legislative departments—of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation. Mr. Cox then asked what he could suggest. To this Mr. Knox replied that they might intercede with the government, and see if they could not move the mails and express to accommodate the business of the country. He said that that would help us out. 'We are in this fight to win, but we are as anxious to have it settled as you are, and we want to go to work.

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but will not until this question is settled as I have outlined. There is a revolution going on in this country. To-day it is a principle that we are contending for. Should we give up, they would make us crawl on our bellies after them.' Mr. Compton stated, among other things, that the A. R. U. organization would not resort to any desperate means, so long as the Railroad Co. would deal with them without using armed force. That their organization was composed of law-abiding citizens, and would not commit any overt acts. At this point Mr. Ray tried to have his resolution read, but was declared out of order, and the resolution remained on the table. Several attempts were made by others, but without effect; whereupon Mr. Avery moved that a vote of thanks be tendered this committee for having made this association of business men so frank and fair a statement in relation to their position with the railroad company and this general boycott. The motion being seconded, it was unanimously carried, after which the committee retired.

"We have read the foregoing statement of the records kept by Mr. Howell of our statements, and certify to their correctness.

"Committee: H. A. KNOX, *Chairman*.

"THOS. COMPTON.

"JAS. MULLEN."

Mr. Knox was asked if he signed the statement produced by Howell. He said he did; that there were some alterations, but they were not material.

Continuing, Howell further stated:

"Saw Knox after the 7th. I had no conversation with him, although I saw him a number of times, after the time I went to his room and he signed that paper, until the 9th of July. I saw him then before the executive committee of the Citizens' Protective Association, at the Orangevale office in Sacramento. George B. Katzenstein, Mr. Van Vorhees, Gen. Llewellyn Tozier, Mr. Frank Miller, Mr. J. V. McClatchy, of the Sacramento Bee, and I am not sure but I think Senator Cox was present at that meeting. The executive committee was composed of nine members, but they were not always there. Mr. Knox was there. I was there. I think Mr. James Mott was there. He is the manager of the Crocker Company up there. During the time of this strike we were in the habit of meeting every day, sometimes twice a day, and we had received information from some source that the government was going to take charge of affairs, and we had heard a good many rumors. We sent for Knox. We brought him there to see what position he was going to take in view of the fact that the troops were to be expected there. This was the 9th of July. These gentlemen met Mr. Knox in the capacity of the executive board of the Citizens' Protective Association. Mr. Katzenstein, the chairman of the executive committee, asked Mr. Knox some questions in relation to the position that his [718] association expected to take, or that he expected to take after the troops got there. My recollection is that Mr. Katzenstein in one of the questions said that it was reported, and so published, that Mr. Debs, of Chicago, had issued a proclamation advising all men to keep away from these public places, from collecting at the depots, and so forth, and he asked him why that rule could not be enforced by the A. R. U. here. Mr. Knox handed Mr. Katzenstein a telegram. The telegram, as near as I can remember,—the substance of the telegram,—was about this: To pay no attention to newspaper rumors; that they were sure to win; that everything was progressing all right in their interests, or words to

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that effect. Mr. Katzenstein asked him this further question: That in view of the fact that the troops were ordered there, and would probably be there the next day, or the morning after, and as the matter was passing out from the civil authorities to the military, and in view of the fact that he was a citizen, the same as the balance of the people he had come there to meet, what position he would take; to which he said, as near as I recollect, that, so far as he was concerned himself, he could not do anything, for there were two or three injunctions against him. But, so far as his men were concerned, which was over 2,000, he had no control of them, and he did not believe they would allow any train to go out of the depot with Pullman cars attached. Then Mr. Katzenstein further asked him, as near as I can recollect, * * * that in view of the fact of the military coming there, and if it would be a question between the principles of his order and the protection of the citizens and his family and so forth, which course he would pursue. He said that the principles of the order of the A. R. U. stood first with him in relation to this business, or in relation to this strike. Mr. Katzenstein, as near as I can remember, called his (Knox's) attention to the proclamation, as it was published in the paper. I don't remember Mr. Knox saying anything in relation to the cause of the proclamation. He produced that telegram. It was read. He handed it out, and talked in about the same strain that was expressed in the language of the telegram. I would not undertake to repeat what he said. I remember distinctly he stated you could not depend on the proclamation. He did not believe there was any truth in it, and used this telegram as evidence to corroborate his statement."

V. S. McClatchy, called on behalf of the United States, testified:

"I am one of the proprietors and business manager of the Evening Bee, Sacramento."

A paper being shown the witness, he said:

"That paper is a statement made by the secretary of the Citizens' Protective Association, under instructions from its executive committee. * * * The paper was drawn up by Mr. Howell, secretary of the Citizens' Protective Association, under instructions of its executive committee, and purported to embody the statements made by the mediation committee of the American Railway Union before the Citizens' Protective Association at its meeting, I think, of July 5th. Mr. Howell was instructed to draw this paper up and present it to the mediation committee for their approval and signature. * * * I saw it signed by two gentlemen. I did not see the third member of the committee sign it. * * * Mr. Knox, who was chairman of the committee, signed it, and, as certain as I can be at this time, the second one was Mr. Compton. The third member, who I think was Mr. Mullen, was not present. * * * At this time I saw those two names signed Mr. Howell was present. He then left it with Mr. Knox, who was to obtain the signature of the third gentleman. * * * I have in my possession another statement signed by Knox, relative to the strike. * * * Mr. Knox made certain statements before the executive committee of the Citizens' Protective Association, I think about July 9th,—I do not want to be certain of the date,—and under instructions I prepared a report of Mr. Knox's remarks before the committee, or some of them, and submitted it to him for approval prior to its being published in the newspaper. Mr. Knox approved it, after minor amendments, and it was published. * * * Mr. Knox signed

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it in my presence. * * * Mr. Knox's signature was obtained in the afternoon, shortly before the Bee would go to press. In order to insure its publication [719] that day, it had to be cut up in what printers call 'short takes.' * * * It was signed before being cut up. It can be readily pasted together."

After further testimony tending to identify the document, it was introduced, and is as follows:

"Chairman H. A. Knox, of the Sacramento mediation committee of the A. R. U., had a short conference this afternoon with the executive committee of the Citizens' Protective Association, at the request of the latter. The work of the committee so far had been directed towards preventing a conflict at Sacramento that could only result in bloodshed, without settling the main issue, and to this end had brought influence to bear on both the Southern Pacific Company and its striking employees to prevent any aggressive measures on either side. The position of the United States government, however, in ordering the opening of the road and the use of federal troops for such purpose, has practically taken all discretion out of the hands of the railroad company and the United States marshal. Mr. Knox was asked, therefore, if the United States government insisted on taking charge at Sacramento and running trains, would the A. R. U. permit it to be done without obstacle, or would it oppose by force the government officials and troops? Mr. Knox stated that personally he would do all he could to prevent a conflict with the government, and, if it moved trains, would not oppose, whether with Pullmans attached or not, and would so advise his men. He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him—over 2,000 strong—that they would not obey orders in that event, and would engage the troops. He said the position of the A. R. U. was in no way changed. It would not permit the running of any trains unless the demands of the organization, as outlined at a former conference with the citizens' committee, and published in the Bee of Friday last, were complied with. His attention being called to the declaration of Eugene V. Debs, head of the A. R. U., calling on all members not to attempt interference with trains or railway property, Mr. Knox said that he had not received officially any such notice, and had been warned by Debs to pay no attention to newspaper reports, unless officially reported to him. He could not, therefore, take any notice of the proclamation referred to, and doubted its genuineness. [Signed] H. A. Knox."

Mr. Knox denies having signed the statement produced by Mr. McClatchy. In this regard he testifies as follows:

"I never signed that statement in the world. That statement, or part of it, was when they called me before their committee in the afternoon, I think, of the 9th. It was simply said verbally, part of it, and part of it was not. I never signed the statement, and they have got more in there than I ever said. * * * The statement is about correct, until we get down to where it says: 'He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him, over 2,000 strong, that they would not obey orders in that event, and would engage the troops.' I never made any such statement as that."

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Barry Baldwin, the United States marshal for the Northern district of California, was at Sacramento during the strike, and testifies as follows respecting statements made to him by members of the mediation committee and others, in relation to the attitude of the American Railway Union:

"I know Mr. Knox, Mr. Compton, and Mr. Mullen. Know Mr. Worden. I saw them on the evening of the 1st of July at the depot, in a caboose, in the yard there, right at the depot, on the tracks. I was told that they were a committee; that they were the leaders of the committee of the strikers. Found Mr. Worden there at the time. * * * I went there officially, in order to protect the mails,—to protect the trains carrying the mails; in [720] order to allow the railroad officials to run the trains carrying the mails. We heard that they were being prevented from doing so. This was Sunday evening, the 1st of July, about eight o'clock in the evening. * * * It was a caboose on the tracks adjacent to the depot building,—the yard at Sacramento; possibly a hundred yards from the river,—fifty to a hundred yards. The parties in the car went to find Mr. Knox. Mr. Knox was not in the car at the time. They found Mr. Knox, and Mr. Knox came in presently, after a little; and they requested a number of people there, who had no business with their committee, to withdraw. A number of people in there withdrew, leaving, I suppose, some six to ten inside the car. It was dark in the car. It was lighted afterwards, but poorly lighted. Mr. Knox was present, and also Mr. Worden, and I believe Mr. Compton, and Mr. Mullen, and several others whom I don't know,—did not recognize at the time. * * * I stated to them the purpose for which I had come to Sacramento, and they asked me whether Pullman cars were to be moved with the train. Knox was the spokesman, and did most of the speaking. The others spoke a little, some of the others, and especially Mr. Worden, who was continually talking and interrupting. I told them who I was, and my purpose in going to Sacramento. * * * My business there was to see them and talk to them, and see what the trouble was, and why these trains could not be moved, and why they were preventing them from being moved. They objected to Pullman cars being moved, claiming that they were willing that the trains should go with the mails and other passenger cars, but not with Pullman cars. They said they had advice that Pullmans were no part of a train,—no part of a mail train; and they gave me to understand that they would not be allowed to go,—to be moved. They said they had eminent legal advice. That they had paid \$250 for the advice. They did not state who had advised them. * * * I told them that I should perform my duties, and see that the trains were moved. I told them that the trains should be moved as often as made up, with Pullman cars attached where it was customary to place them. I told them that I was certain they were not right in doing it,—in opposing the proper authorities and defying the law. They continued in the attitude that they could not allow Pullman cars to move. I told them my purpose in being there was to protect those mail trains, and trains carrying the mails,—United States mails. * * * Had conversation with Mr. Worden on my way up from the caboose out across the tracks. He asked if we knew who he was, and I then first learned his name. He said that his name was Worden; that every one knew him there, and he was prominently connected with the movement. * * * It was the A. R. U. people that were organized there. They were the mediation committee of the A. R. U. They were the committee. I

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treated them officially as leaders of the movement,—ostensible leaders of the movement.

The same witness further testifies, as to the action and attitude of the mediation committee, substantially as follows:

"I saw the members of the mediation committee again (the second time) on the evening of the 2d, at the Golden Eagle Hotel, at my room. Saw Knox, Mullen, and Compton. They came to see me as the mediation committee of the A. R. U. They came to see me as U. S. marshal. They came to see me at the room I occupied. I informed them that it was my intention to go down the next day, and clear the depot grounds of the crowds that were there, in order that the railroad company could move their trains,—the mail trains, or trains carrying the mails,—and that I hoped that the strikers would not offer any resistance; that I was there by lawful authority to do this; it was my duty to do it. Then we talked the matter over. They said that they had no wish to use any violence. They asked me to go down. They said they would do all they could to get the strikers to vacate the depot grounds. They asked me to go down myself, or with as few deputies as possible, for they thought there was less danger of a conflict if I did that; that I could get on better alone than to take down a number of deputies; that it might irritate the people, and we would not get on well. But they said they would assist me as much as they could in inducing the crowd to clear away from the depot, and allow the trains to be operated. [721] They said that if they did this they wanted me to allow them to send a committee of three to induce the engineers, or those that were to work the trains, in together, to persuade them not to go out with the Pullman cars; to go inside of the line I might form. I told them that I did not know that I would object to their doing that, so long as they did not intimidate them,—so long as they were not too persistent, and would not continue to talk to them too long, or in any other way threaten them, by numbers of talk; and also, if the people they were talking to did not wish to hear them, did not wish to listen to them, and requested them to leave, why, they should leave. But I told them that I could not promise even that I would let them do that; that I could not say at that moment; that there might be some objection arise at the time on the part of the railroad company, and I might have to further consider the question as to their right to be present at the depot grounds, but at that time I did not see any objection to it, as long as they did it peaceably."

Mr. Knox, in his testimony, details this interview in the caboose as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from,—Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course, we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did; consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the

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gist of our conversation all the way through. It was repeated several times."

T. W. Heintzelman, master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the United States, testified as follows:

"I know Knox and Compton. They were out on a strike. Before the strike, Knox was a switchman, and Compton was a machinist working in the shop. * * * I was present during a part of a conversation between Knox and Mr. Small at the roundhouse on June 30th. Mr. Small was the superintendent of motive power. * * * I heard Knox remark that they were in the strike to win, and they were going to win by any means."

E. C. Jordan, locomotive engineer at Sacramento, called for the United States, testified to attending a meeting on June 29, 1894, at which Knox was present, as follows:

"In relation to a telegram he said he would get, it was asked him as to what his jurisdiction was in this matter; and he stated that his jurisdiction extended from Sacramento to El Paso and to Portland and to Ogden, out of Sacramento. * * * There were three orders present,—Conductors, the Engineers, and Mr. Knox, of the A. R. U. * * * The meeting was held for the purpose, as I understood it, of taking some action to bring the strikers or the A. R. U. men and the company together, in order to devise some means by which the strike could be adjusted in some manner to start the road."

The following telegrams, purporting to have been signed and sent by H. A. Knox to various unions within his jurisdiction, respecting the state of affairs at Sacramento, and transmitting advice to other local unions with reference to the action they should take, were in- [722] troduced by the prosecution for the purpose of showing the concert of purpose and action among the different branches of the American Railway Union.

"June 27, 1894. To I. B. Hoffmire, Portland, Or.: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To E. V. Debs, Pres. A. R. U., Chicago: Will we stop loaded sleepers? Ans. H. A. Knox."

"June 27, 1894. To W. H. Chune, Los Angeles: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To J. M. Wagner, Ogden, Utah: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir, Cal.: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To E. V. Debs, Chicago, Ill.: The ORC and BRI are going to take train out to-night. We are going to stop everything. Answer. H. A. Knox."

"June 28, 1894. To J. M. Wagner, Ogden, Utah: Be ready to go out at moment's notice. H. A. Knox."

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"June 28, 1894. To M. C. Roberts, Dunsmuir: Don't know, but if any, you hold. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: Yes; stay in Rocklin. H. A. Knox."

"June 29, 1894. To C. B. McClintock, Truckee, Cal.: Hold Nos. 4 & 2 sure. H. A. Knox."

"June 29, 1894. To G. W. Lindsay, Wadsworth, Nev.: Hold No 4 there sure. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: General tie up ordered. Notify all concerned. Answer. H. A. Knox."

"June 29, 1894. To McClintock, Truckee: General tie up ordered. Notify all concerned. H. A. Knox."

"June 29, 1894. To E. V. Debs, Pres. A. R. U., Chicago: General tie up ordered on S. P. system. All out. H. A. Knox"

"June 29, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Everything on system at standstill. Company makes their death struggle to-night. H. A. Knox."

"June 30, 1894. To F. Almas, Summit, Cal.: No; stop at once. H. A. Knox."

"June 30, 1894. To J. C. Church, Carlin, Nev.: Ice until further orders. Everything stopped. H. A. Knox."

"June 30, 1894. To J. T. Roberts, Oakland, Cal., A. R. U.: Have any troops left, and where are they going? H. A. Knox."

"June 30, 1894. To J. T. Roberts, A. R. U., Oakland: Has train left with deputy marshals? Rumor here. H. A. Knox."

"June 30, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: This motion was adopted by B. of L. E. and O. R. C.: That the basis of the settlement be that all discharged men who have taken part in the Pullman boycott be reinstated, and guaranty given men won't be discharged for same cause. Pullman boycott to remain in force, and strike declared off. This is the grandest victory ever won, and everybody is on our side. H. A. Knox."

"July 1, 1894. To A. W. Wallace, Rocklin, Cal.: There was, but we stop at other points. Not wheel moving. H. A. Knox."

"July 1, 1894. To J. T. Roberts, A. R. U., Oakland, Cal.: Keep me posted on everything that leaves there. H. A. Knox."

"July 1, 1894. To W. H. Clune, Sec., Los Angeles, Cal.: How are engineers and conductors standing with us down your way? H. A. Knox."

"July 2, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Did you give permission to move Mrs. Stanford? H. A. Knox."

"July 2, 1894. To H. L. Walthers, Dunsmuir, Cal.: She can go via Davis, not by Sacramento."

"July 2, 1894. To H. L. Walthers, Dunsmuir, Cal.: Troops coming here. Stand firm; we are. Ans. H. A. Knox."

"July 3, 1894. To E. E. Barton, Ogden, Utah: We understand Co. tried to brake block, but we fooled them. H. A. Knox."

[723] "July 3, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Hunt up the National Pres. of the Marine Engineers. Confer with him. Steamers are a terrible damage to us. H. A. Knox."

"July 4, 1894. To McClintock, Sec. A. R. U., Truckee, Cal.: Big army here. You come with all guns and volunteers. Come by train without orders at once. H. A. Knox."

"July 4, 1894. To E. E. Barton, Ogden, Utah: Good. Same here. We have 4,000 beside the city. Stand firm. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Soldiers on this end of American river. Don't stop. Bridge O. K. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Come. Bring all hands. Rush. H. A. Knox."

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"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

"July 4, 1894. To W. H. Walthers, Dunsmuir, Cal.: Don't close the Western Union office. That will hurt our cause. And take guard away from the Postal office. H. A. Knox."

"July 4, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: We have the troops on our side. They have refused to obey commands, and we are stayers from away back,—bound to succeed. H. A. Knox."

"July 5, 1894. To C. B. McClintock, Truckee, Cal.: Please allow merchants to take perishable freight from cars, but agent must check it to them. H. A. Knox."

"July 5, 1894. To Madden & Turner, Dunsmuir, Cal.: All quiet here. We are sure to win. H. A. Knox."

"July 5, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: It is reported the U. S. marshal and Gen. Dimond, of state troops, has turned our affair over to Washington. Have attorney there to work on it. We have everything our own way, and have not broke the law, only by keeping about 5,000 men in sight. Please advise us what to do. Not a wheel moving. H. A. Knox."

"July 6, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Any truth in report of strikers and soldiers having battle in Chicago? Please ans. We are as firm as rock. H. A. Knox."

"7/7/1894. To J. M. Wagner, Ogden, Utah: All quiet. Stand firm. H. A. Knox."

"July 7, 1894. To Wm. O. Leary, Pres. Miners' Union, Virginia City, Nev.: Resolutions received, and return thanks. We are bound to win. We are as solid as rock. H. A. Knox, Chairman."

"July 8, 1894. To W. H. Clune, Los Angeles, Cal.: Force them to stop, or tell them when we settle, their firemen will run their engines. We done that, and you bet it brought them to time. All quiet here. We are solid as rock. H. A. Knox."

"July 9, 1894. To W. H. Clune, Los Angeles, Cal.: Everything very quiet here. Nothing moving here. How is things there? Stand firm, and don't let nothing go. H. A. Knox."

"July 9, 1894. To Chas. Fink, Oakland, Cal.: We sent Geo. Hale to Vallejo, but if there at Oakland he is O. K. H. A. Knox."

"July 11, 1894. To W. G. Boyce, Pres. Miners' Union, Silver City, Nev.: Thanks for sympathy. We are under heavy expense. Financial aid would be gratefully received. H. A. Knox, Chairman."

"July 11, 1894. To Chick Featherson, Summit, Cal.: I received orders from E. V. Debs to order strike on entire system. Hence my order. Sacto. is solid yet. H. A. Knox."

"July 11, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Sorry you are in jail, but be strong, and we will carry the strike on if they put all of you in jail. Lots of soldiers here, but everything quiet so far. Every man out here, but a few scab engineers. H. A. Knox."

"July 11, 1894. To J. S. Walton, Oakland, Cal.: Adopt code. Lots of soldiers here, but everything quiet yet. H. A. Knox."

"July 12, 1894. To J. Balder, Truckee, Cal.: Train of soldiers getting ready to leave here for Truckee. Everything quiet. H. A. Knox."

"July 12, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: I will stand [724] by A. R. U. as long as life lasts. I refused to run for railroad commissioner, because I thought so much of the fight. We are doing nothing but what is proper. We are going to fight it out on this line. We have 1,800 soldiers here, but no trains out yet. H. A. Knox."

"July 13, 1894. To Chairman A. R. U., Truckee, Cal.: Reports all

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fake. Stand pat. Freight left here, under protection of soldiers, for the East. H. A. Knox."

" July 13, 1894. To Clune, Chairman A. R. U., Los Angeles, Cal.: Reports all fakes. Strike is on in full force. Stay with them to the last. All O. K. here. H. A. Knox."

" July 13, 1894. To J. C. March, Carlin, Nev.: 1,800 soldiers here for two days, but have only got freight out east. Reports are all false. Stand pat. H. A. Knox."

" July 13, 1894. To F. M. Gillett, San Luis Obispo, Cal.: Reports all false. Stand pat. 1,800 troops here, but got only one train out in two days. Sure to win. H. A. Knox."

" July 13, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: United Press dispatch says you have declared strike off. I have sent messages all over denying it. Answer. H. A. Knox."

Telegrams have been introduced purporting to have been signed by H. A. Knox, addressed to E. V. Debs, at Chicago, and to other persons, in relation to the strike, dated July 14th, and subsequent dates; but Knox testifies that he was arrested on July 14th, and was in jail for three weeks, and he denies specifically having signed the 11 telegrams dated July 22d, which bear his name. It is possible that some member of the mediation committee, or other officer of the American Railway Union at Sacramento, acting for the committee, may have signed these telegrams in the name of Mr. Knox; but as the testimony in the case, and particularly the telegrams sent out by T. H. Douglass, who appears to have been chairman of the mediation committee after July 14th, indicate that the strike was declared off on July 21st, telegrams purporting to have been signed by Knox, and dated after July 14th, and particularly those dated July 22d, are certainly discredited, and I will not, therefore, refer to them further in this connection. In any view, they do not appear to be important.

George Vice testified, on the part of the defense, that he had been a locomotive fireman for the Southern Pacific Company in June last; that he belonged to the American Railway Union at Sacramento; was the vice president of it; thinks he was present the night that the telegram came from Chicago, announcing the fact that there was going to be a Pullman boycott. He admits signing the following telegram:

" Sacto., July 6, 1894. H. F. Michaels, Master Cactus Lodge, 94, Tucson, Ariz.: Firemen of following lodges out with A. R. U., to the man: 260, 143, 312, 91, 97, 19, 53, 98, 366, 193, and Roseburg. If you tie division up, will guaranty full protection of A. R. U. Not a wheel turned here for six days. Answer. Geo. Vice, Master 260."

Charge to the Jury.**Also the following:**

"Sacramento, Cal., July 16, 1894. J. Friant, Fresno, Cal.: Firemen here stand firm. Scabs scarce. We are winners. Geo. Vice."

Also the following:

"Sacto., July 16, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Firemen here all firm. Scabs scarce. We're winners. You stand firm. Geo. Vice."

[725] He also admits sending the following:

"Sacramento, Cal., July 17, 1894. R. E. Nobel, Summit: Quit immediately and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

The witness, being questioned about the wording of the telegram, testified further as follows:

"A Juror: Q. What did you mean by 'tie up everything'? A. Leave their work. Q. You said, 'Quit and tie up everything.' What do you mean by 'tie up everything'? A. Just to leave work. The Court: Q. You say, 'Quit and tie up everything.' 'Quit' seems to be your definition for 'tie up.' A. I meant the same thing by it. Q. 'Quit' and 'tie up' are the same thing? A. Yes, sir. Mr. Knight: Q. By 'tie up everything,' you mean leave work from everything? A. Leave the service. Q. From everything? A. Yes, sir. Q. What is the meaning of the word 'everything'? You said, 'tie up everything.' A. I suppose there is a whole lot of meaning to 'everything.' Q. What is your meaning in that connection? A. If a man is on a job, according to that,—if he is on an engine,—he will leave his work."

He also admits sending the following telegram:

"Sacramento, Cal., July 17, 1894. J. J. Brennan, Rocklin: Stand. Do not allow anybody to report for work. Stronger here than ever. We're sure winners. Geo. Vice."

The witness states:

"When this telegram was sent, it was only meant for the firemen. There were lots of firemen that did not belong to the A. R. U."

Admits writing and sending this telegram:

"Sacramento, Cal., July 17, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Still firm, and will stay to last. Sure winners. Gaining recruits from scabs. Fillmore weakening. He interviews mediation board, and makes concessions. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. H. F. Michaels, Tucson, Ariz.: State situation. Tied up here tighter than ever. Use all means to do same there. We're winners. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. W. J. Featherston, Summit, Cal.: Quit immediately, and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

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Also this one:

"Sacramento, Cal., July 21, 1894. F. P. Sargent, Terre Haute, Ind.: Eastern B. L. F. men taking our jobs. For God's sake, save us. S. P. will not re-employ us. Use all means to save us. Answer. Geo. Vice, Master 260."

The witness states that he had no authority to send telegrams for the American Railway Union; that he sent them by virtue of his being a master of the Brotherhood of Locomotive Firemen. He admits, however, that he was also an officer of the American Railway Union, being its vice president.

H. B. Breckenfeld, called for the United States, testified that he was chief train dispatcher for the Sacramento Division of the Southern Pacific, at Sacramento; that he knew Terry Douglass; that he knew that Douglass was connected with the A. R. U. during the recent strike, because Douglass appeared before Mr. Fillmore, or in his rooms, on one or two occasions, in connection with the strike; [726] that on one occasion Douglass came in an official capacity; that, when he did come in an official capacity, Douglass announced that they had decided to declare the strike off. This was in the latter part of July. Douglass' position in the American Railway Union was a member of the mediation committee. Douglass was not a member of the mediation committee right through the strike. The witness understood that they (Douglass and the two men who accompanied him on the occasion just referred to) took the place of the original mediation committee at Sacramento. On the occasion referred to they came into the rooms of Mr. Fillmore, and requested the stenographer who was present to prepare upon the typewriter a statement to that effect, which was read to them by the stenographer, and was signed by them. The witness was present when this was done. Witness knows the handwriting of Douglass. Identifies the signature of Douglass on the following telegrams:

"Sacto., July 14th, 1894. To F. P. Cox, Rocklin, Cal.: Men are determined. Situation good. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: A committee of fruit growers has waited on us. Are you any nearer a settlement? Ans. quick. T. H. Douglass."

"Sacto., July 16, 1894. To S. Brennan, Rocklin, Cal.: Message from Debs. Situation everywhere good. Switchmen have all quit here. T. H. Douglass."

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"Sacto., July 16, 1894. To R. A. Battenfield, Rocklin: Four trains tied up at Red Bluff. No crews to move. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: Scabs coming from East. With few exceptions, men solid here. T. H. Douglass."

"Sacramento, Cal., July 17, 1894. To R. A. Battenfield, Rocklin, Cal.: Situation better than yesterday. Prospects brighten every hour to A. R. U. T. H. Douglass."

"Sacto., July 18th, 1894. To R. A. Battenfield, Rocklin: Did any train leave Rocklin this morning? T. H. Douglass."

"Sacto., July 18th, 1894. To W. Balder, Truckee, Cal.: Received message from James Hogan. He states situation firm everywhere. T. H. Douglass."

"Sacto., July 18th, 1894. S. J. Brennan, Rocklin: Situation has not changed. No work for shopmen. T. H. Douglass."

"Sacto., July 18th, 1894. To E. E. Barton, Ogden, Utah: Committee waited on J. A. Fillmore. Nothing satisfactory. Men remain firm. T. H. Douglass."

"Sacto., July 19, 1894. To G. W. Lindsay, Wadsworth, Nev.: No change in situation here. Remain firm. T. H. Douglass."

"Sacto., July 20, 1894. To James Hogan, Chicago, Ill.: True situation men wavering in many places. Give your views affairs. T. H. Douglass."

"Sacto., July 21st, 1894. To F. P. Cox, Rocklin, Cal.: Probably strike will be declared off at 2 p. m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To W. Balder, Truckee, Cal.: Expect strike to be settled by 2 p. m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To G. W. Lindsay, Wadsworth, Nev.: This lodge has declared strike off by unanimous vote. T. H. Douglass."

"Sacto., July 21, 1894. To S. J. Brennan, Rocklin, Cal.: This lodge has declared strike off. T. H. Douglass."

"Sacramento, Cal., July 21, 1894. To W. Balder, Truckee, Cal.: Strike has been declared off Pacific, unconditional. T. H. Douglass."

T. H. Douglass, called for the defendants, testified: That he was a brakeman last June and July, running between Sacramento and Truckee. That he belonged to the American Railway Union and Order of Railway Conductors. That he acted as chairman of the mediation committee, he thinks, from the 12th or 13th or 14th [727] of July. That the occasion of his so acting was because the original members on that committee were arrested. That John Hurley and G. H. Hale were on the committee with him. That he continued in that capacity until the strike was declared off. That he does not remember the day when the strike was declared off, but he thinks it was the 25th day of July. He attended a meeting of the American Railway Union on the 26th of June. There was a message read from E. V. Debs, declaring a boycott on Pullman cars. The union took action on the matter, and declared a boycott. Was in Truckee when the strike was ordered. First heard of it about 6:30

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in the morning. "The train master asked the crew if they would go out on No. 20. They told him, 'Yes.' After he [the train master] left, seven or eight men came in, and told us there was a strike ordered, and had not better go. Well, we did not go." Douglass admits having received and sent a number of dispatches during the strike.

BEGINNING OF THE STRIKE AT OAKLAND.

Thomas J. Roberts, a witness for the defendants, testified that he resided in West Oakland; that he had been employed for six years as a locomotive engineer for the Southern Pacific Company; that he was president of local union No. 310, of the American Railway Union, which was organized in May, 1894; that the first he knew of any trouble was a communication he received from Mr. Worden, who was delegate to the convention in Chicago. He says:

"I received a letter from him stating that the Pullman boycott had been declared, to take effect in five days, unless the trouble between the Pullman Company and their employes was settled. On the same day a telegram was read in our meeting—that was Tuesday, June 26th—from the president of our general union, saying, 'Pullman boycott in effect to-day noon, by order of convention.'"

He further says:

"It was the evening before we received the telegram, and, that being our regular meeting night, the secretary held the telegram until the meeting opened; and after the meeting had opened, and we got through with our preliminary work, the telegram was read, and the matter was discussed, and I think the telegram said the Pullman boycott was in effect that day at noon. Still we did not want to take any snap judgment on the company, and we decided not to put it into effect until 12 o'clock the following day, June 27th. That would be Wednesday. A motion was put and carried to that effect, and our secretary was instructed to notify the Southern Pacific officials that after Wednesday, June 27th, at noon, we would not handle any Pullman cars, or do any Pullman work."

Continuing, the witness testified:

"June 27th the boycott took effect, at noon. That afternoon we had some trouble in the passenger yard where I was employed. Some of the boys that were cleaning cars were instructed by some foreman that they were working under to clean some certain Pullman cars, and they refused to do so. They told him that they belonged to the American Railway Union, and that there was a boycott in effect, and that they could not clean the Pullman cars. He told them that if they did not want to do that there was nothing else for them to do, and that they could go home."

The men were reinstated at his request. They went on with their customary work. The strike was to take effect

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the morning of the 29th, at 12:30. It was for the reinstatement of the men who had [728] been discharged. By "strike," he means that the men were all to withdraw from the service of the company, and refuse to work. In case the men were reinstated, they would be returned to work. By "the men," he means the strikers. There was no resolution. That was the understanding,—his understanding. The secretary was instructed to notify all the unions on this system, or in this state; he is not sure which. All the action that was taken was that they advised the men to try and keep men from going to work and taking their places; to persuade those that were at work to quit. "Tie up" is all railroad phrase. It means to cease work. It is used by officials and train dispatchers. Perhaps a train at Port Costa may get orders, "Train No. 18 will tie up at Tracy." That means that they will not go any further.

The witness was shown a number of telegrams, among others the following, which he admits having sent:

"West Oakland, Cal., June 28, 1894. To F. P. Sargent, Terre Haute: Firemen's lodge here indorsed Pullman boycott. Will not handle their cars. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To W. H. Russell, Secretary B. R. T., Bakersfield, Cal.: What is situation? Define position of B. R. T. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To H. A. Knox, A. R. U., Sacramento, Cal.: No troops sent out from here. T. J. Roberts."

"Oakland, Cal., June 29, 1894. To E. H. Leon, San José, Cal.: Firemen out here. Do not work. Come home. T. J. Roberts."

"West Oakland, July 14, 1894. To F. P. Sargent, Terre Haute, Ind.: Authorized American Railway Union strike here. Shall B. L. F. men work during strike? T. J. Roberts."

"West Oakland, July 18, 1894. To F. B. Porter, Reno, Nev.: Solid here. Do not waver. Victory is ours. T. J. Roberts."

He was in frequent correspondence with the officers of different lodges of the American Railway Union throughout the state, and in some instances with the American Railway Union headquarters at Chicago, during the strike. Does not know particularly that he sent them by virtue of his official position as president of the American Railway Union in Oakland. It was merely for information. The union sent a great many official notifications of the strike throughout the state. He did not. The secretary sent them. The union ordered the secretary to notify the different local

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unions in the state of the strike here. They had no authority to send them in his name. They related to the strike. He got some messages from Knox, of Sacramento, and sent him some.

G. D. Bishop, called for the defense, testifies that he was the secretary of the American Railway Union at Oakland. The secretary was instructed, the night of the boycott, to notify other unions in reference to the boycott.

BEGINNING OF THE STRIKE AT RED BLUFF, TRUCKEE, AND DUNSMUIR.

John Kelly testified, as a witness on behalf of the government, that he went out on strike on June 28th or 29th; that he had been a fireman for the Southern Pacific Company; that he went out at Red Bluff; that he was a member of the American Railway Union; that that had to do with his going out on a strike.

J. P. Heaney, a witness called for the defendants, states that he [729] went to Red Bluff from Sacramento on June 28th; that he lived at Sacramento, and belonged to the Sacramento lodge of the American Railway Union; that he had been braking for the Southern Pacific Company; that there was no American Railway Union organization at Red Bluff. He testifies as to being advised of the strike by a telegram from Mr. Knox; that he had asked Mr. Knox if there was a strike ordered, and the latter had replied, "Yes, there is a general strike ordered by Eugene V. Debs." The witness states that he was appointed chairman of a committee at Red Bluff. The committee were composed of railroad employés who had struck. Although the witness is very uncertain as to the purpose of the meetings, and the appointment of the committee of which he was chairman, he admits that at least one of its objects was in order that there might be some authorized person to receive and send dispatches for the men out on strike at other points, and be a channel of communication between Mr. Knox and the men at Red Bluff. He received quite a number of dispatches from Mr. Knox, and from other places. Although Heaney admits having received a great many telegrams, his recollection as to their

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contents is extremely vague. But one of these telegrams was introduced on the part of the prosecution. It is as follows:

"3:15 p. m., July 3/94. Red Bluff, Cal. Received at Sacramento, Cal. Jack Heaney: Trains switched by official. Coaches detained by three thousand people. H. A. Knox."

One from Heaney reads as follows:

"Red Bluff, Cal., July 2, '94. H. A. Knox, Sacramento, Cal.: Shall we let Adams, engineer that brought No. 15 in, go back with Mrs. Stanford's special? He has no fireman. Heaney."

The following is a telegram from Dunsmuir, purporting to be signed by M. C. Roberts:

"Dunsmuir, Cal., June 28th, 1894. H. A. Knox, S. P. Depot, Sacramento, Cal.: Has Portland boycotted Pullman? Answer. M. C. Roberts."

Mr. Knox replied:

"Sacramento, Cal., June 28, '94. M. C. Roberts, Dunsmuir, Cal.: Don't know. But if any, you hold. H. A. Knox."

From Truckee comes the following telegram:

"Truckee, Cal., July 4, 1894. H. A. Knox, Sac.: Do you still want us? Train on mail line ready to go. C. B. McClintock."

Mr. Knox replied:

"July 4, 1894. To C. B. McClintock, Truckee, Cal.: Come without fail; coming from all points. H. A. Knox."

The following telegram purports to have been sent by F. H. Almus to Mr. Knox:

"Summit, Cal., June 30/4. Harry Knox, Chairman of A. R. U. Committee, Sac.: Will I continue service on work train or not? Answer. F. H. Almus."

Almus testified for the defendants, and stated that he was a member of the American Railway Union. Knox's reply is as follows:

"June 30, 1894. To F. Almus, Summit, Cal.: No. Stop at once. H. A. Knox."

[730] The following telegrams are from Los Angeles, signed by W. H. Clune:

"June 27/4. Los Angeles, Cal. G. D. Bishop, Secretary A. R. U. 310, W. Oakland, Cal.: Stand firm. Will boycott at Los Angeles this p. m. W. H. Clune, Sect. No. Eighty."

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"L. A. 7/2, 1894. To T. J. Roberts, Prest. A. R. U., Oakland, Cal.: Resolutions in press is fake. Out of one hundred engineers here, ninety-seven are with us to till the end. Trainmen, firemen, carmen, shopmen, section and bridge men,—solid. W. H. Clune, Secty."

STRIKE IN SAN FRANCISCO BY A. R. U. LODGE 345.

It is admitted by the defense that the defendants John Mayne and John Cassidy were members of this lodge at the time of the strike. Rice and Clark, the two other defendants charged in the indictment, but who are not on trial, were also members of the same lodge. Charles Ault, called for the government, testified: That he was a member of the American Railway Union. That the number of his lodge was 345, San Francisco. It was the same lodge to which the defendants belonged. One Bradley was president, and another person, by the name of Elliott, was on the executive committee. This lodge went out on the strike, as a body, on June 29th,—the night of June 29th. It also appeared from the testimony of H. J. Bederman, a witness for defendants, that one J. E. Riordan was its secretary. McClintock was also a member of this lodge. The purpose which prompted the lodge to join the strike is stated by the testimony as follows: T. J. Roberts, president of the Oakland lodge, American Railway Union, testified that the union of which he was president authorized the secretary to send telegrams to different unions, as follows:

"American Railway Union three hundred ten declared strike. Takes effect twelve thirty a. m. to-day."

A telegram to this effect was sent to the lodge in San Francisco:

"Oakland, Calif., June 29, 1894. J. E. Riordan, 118 Sixth St., Room 71, S. F.: American Railway Union three hundred ten has declared strike. Takes effect twelve thirty a. m. to-day. T. J. Roberts, President.

Mr. Roberts, when examined, said that he had not personally authorized the sending of telegrams of such purport, and knew nothing about them. Some 21 others of a similar character were sent to different places.

Mr. Bishop, the secretary of the same organization, testified that these telegrams were sent out by direction of the union. They were authorized by the union. It will be

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noticed that the dispatch claimed by the government to have been sent to Riordan, of the San Francisco union, of which the defendants were members, is practically to the same effect. This witness acknowledged receiving the following telegram, purporting to come from J. E. Riordan:

"San Francisco, June 30, 1904. G. D. Bishop, Oakland: Committee out on organization Narrow Gauge. Your assistance required. J. E. Riordan."

He testified that he authorized the sending of the following telegram to J. E. Riordan on June 30, 1894:

"Oakland, Cal., June 30th, 1894. To J. E. Riordan, 118 6th St., S. F.: Will send men at once to confer with you. G. D. Bishop, Sec."

[731] H. J. Bederman, a witness called for the defendants, and employed as a switchman by the Southern Pacific Company last spring, testifies, substantially, that he belonged to Lodge 345, San Francisco, of the American Railway Union; that the defendants belong to the same lodge; that the occasion of the strike by his union was on account of some of the members being discharged for not handling Pullman cars; that an executive and press committee was appointed; that the executive had charge of almost everything concerning the strike of the men; that most of the men belonging to his union worked on the Coast Division; that the committees were appointed on the evening of June 29th; that all the power regarding the strike was delegated to the executive committee, so that this committee had charge of the strike; did not seem inconsistent to him in striking on a division where there were no Pullman cars; not a question of sympathy; they were members of the union; they were supposed to do what was right by every member; if one was discharged for a cause he was not guilty of, they would try and protect him; the union protected them; Mr. Riordan was secretary of the union.

George Elliott testified, on being called as a witness for the defendants, that he was a foreman switchman in the passenger yards of the Southern Pacific Company, at Fourth and Townsend streets; that he joined the American Railway Union (Lodge 345, San Francisco) on the night of the 29th of June, or the 30th; that he became chairman of the executive committee; that this committee were to do everything

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that was to be done in connection with the strike; they had full power; the question of Pullman cars never, to his knowledge, came up; they struck for the reinstatement of employés that had been discharged. On cross-examination he states that he struck because of the discharged employés; he believes some were discharged in Los Angeles, and some in Sacramento; simply struck to see justice done. On redirect examination, he said that he first got some information about the strike from Mr. Bederman; that he believes that Bederman read a message to him; he doesn't know whether it came from Oakland or Sacramento.

Edward F. Gerald, a witness called for the government, gave testimony tending to prove the handwriting of Mr. Riordan. He states, respecting the following telegrams, that he "thinks they are all Mr. Riordan's signatures":

"San Francisco, 6/29, 1894. To Chas. E. Bradley, Engineer S. P. Co., Pajaro: Strike ordered to-day noon. Let trains come north. Notify San José and along the line. J. E. Riordan."

"June 29, 1894. F. Gillett, San Luis Obispo, S. P. Co. Caboose: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. C. E. Bradley, Tres Pinos, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. A. E. Pratt, Pacific Grove, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. E. B. Stanwood, Castroville Station, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. G. W. Gillett, Aptos, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

[732] "F. W. Clark, Pac. Grove: Greer O. K. Keep on good work. Tie up strong. J. E. Riordan."

"San Francisco, 6-30, 1894. G. D. Bishop, Oakland Yard S. P. Co. Committee out on organizing Narrow Gauge. Your assistance required. J. E. Riordan."

It is admitted on the part of the defendants that the following telegrams were signed by George Elliott, although, when the latter was cross-examined, he could not recollect as to whether he signed some of them, and denied that he signed others. The witness J. E. Dillon identified his handwriting.

"San Fran., 7/1, 1894. To R. Gillett, Aptos, Cal.: Not a wheel turning between here and Chicago. It is our fight sure. Will keep you posted. George Elliott, Chairman."

"7/2, 1894. To Ed Stanwood, Castroville Station: Everything is

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coming our way. Not a wheel moving between here and Chicago. Victory is certain. George Elliott, Chairman A. R. U."

"7/2, 1894. To Ed Pratt, Pacific Grove: We are gaining strength rapidly. The fight is ours. Everything is coming our way. George Elliott, Chairman A. R. U."

"San Fran., 7/3, 1894. To R. W. Gillett, Aptos: No, sir. Allowing no trains to run we can help. Geo. Elliott, Chairman."

"San Francisco, 7/3, 1894. To J. Morehead, Pacific Grove: No, sir. Out to win, and going to. Will advise when settled. George Elliott, Chairman."

"7/3, 1894. To W. H. French, Aptos: You are all in to clear. Eugene V. Debs wires giving you full protection. Tie up everything at once. George Elliott, Chairman."

"7/3, 1894. To J. M. Smith, Tres Pinos: Fight is ours, and win we must. George Elliott, Chairman A. R. U."

"7/3, 1894. To W. Johnson, San José, Care Eureka Hotel: Do not move. Committee will see you to-morrow morning. George Elliott."

"7/3, 1894. To F. W. Gillett, San Luis Obispo: You are a brick. Debs wires that we will win. George Elliott."

I have now directed your attention to some of the testimony that tends to show the communications that passed between the various lodges of the American Railway Union and their members concerning the boycott and strike, and the concert of action that was had in pursuance of such communications. I have also called your attention to some of the statements of Knox and others as to the purpose of the boycott and strike, and the purpose they had in view in taking the action they did. To review all the testimony in the case bearing on this point would take too much time, and will not be necessary, in view of the argument of counsel for the defendants, who admits the concert of action claimed by the government, but denies that it involved a criminal purpose. With respect to these telegrams, and the testimony I have referred to in connection therewith, you will bear in mind that many of them have been admitted in evidence with the consent of counsel for defendants; the genuineness of others has been denied; and the testimony as to still others is, by reason of the contradictory nature of the testimony, involved in more or less uncertainty. As you are the sole judges of the credibility of the witnesses, and of all the evidence introduced in the case, whether it be oral or written or documentary, you will determine the genuineness of such of these telegrams as are in controversy, and this you will do from all the circumstances in the case. In passing upon the telegrams not admitted as genuine, you will be justified in resorting to all [733] those facts and circumstances in the

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case which will tend to establish their genuineness, or, on the other hand, serve to show their want of genuineness. For example, you may consider the occasions and occurrences to which the telegrams purport to relate; whether they would have been sent, but for such occurrences; the relation they bear to the events which you may deem the evidence establishes to your satisfaction, and beyond a reasonable doubt; their tenor and subject-matter; the fact that the sender or the recipient, as the case might be, was connected with the American Railway Union. In fact, all those circumstances and incidents which may be rationally and naturally connected may be considered by you in passing upon their authenticity, and the probability of their having been sent and received by the parties whose names appear upon said messages. The importance and materiality of these telegrams as showing, or tending to show, that the conspiracy charged in the indictment did in fact exist, is for you to determine. There are two important facts, however, to which it is proper for the court to call your attention, in your consideration of this question, and these are that most, if not all, of these telegrams were sent, or purport to have been sent,—whether they were or not is, as I have stated, for you to determine,—by and to members of the American Railway Union, and in the greater number of instances by those in authority in that organization, and who the testimony I have referred to, and other evidence adduced during the trial, tends to show were actively concerned in the strike, and took part in it with the avowed purpose of preventing the movement of all Pullman cars. Another significant circumstance, to which I call your attention, is that you are to consider whether these telegrams related to any of the facts charged in the indictment as constituting the conspiracy to commit the acts with which these defendants are accused, and whether they had any bearing or connection in any way with the acts charged in the indictment as means to effect the object of the conspiracy, and with reference to which—or some of which—acts the prosecution has introduced evidence showing, or tending to show, the conspiracy and overt acts, and the connection of these defendants with such conspiracy and acts. If you are satisfied from the evidence that these messages related to, formed a

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part of, or had any bearing upon the object of the conspiracy, and the means to effectuate such object, charged in the indictment, and the overt acts alleged to have been committed in furtherance of such conspiracy, it is a circumstance which you may consider in determining the existence of such conspiracy. You will consider whether they establish, or tend to establish, the concert or purpose and action which constitute important elements in this case as to the existence of the conspiracy charged; particularly, where a number of telegrams of similar purport and tenor are sent to different places at or about the same time, and all proceeding, or purporting to proceed, from the same person or local lodge of the American Railway Union. Thus, the telegrams sent by Knox, who, as testified to, was chairman of the mediation committee at Sacramento, [734] and whose jurisdiction as such extended over a good part of the Pacific coast, or of Roberts, the president of the Oakland lodge or union, or of Bishop, its secretary, or of Douglass, Vice, Elliott, Riordan, and such others as the evidence shows, or tends to show, sent telegrams of the same general character, these persons being officially connected with the American Railway Union,—whether these show, or tend to establish, a unity of design, a community of purpose, an express or tacit understanding to do the acts charged in the indictment.

It is claimed by the defendants that, while there may have been some concert of action on the part of the members of the American Railway Union with respect to the boycott and strike, the purpose of such concerted action was merely to advise members of that organization to quit work until the controversy between Pullman and his employés should be settled. As I have explained to you before, even this purpose would become a criminal conspiracy, if the concerted action were knowingly and willfully directed, by the parties to it, for the purpose of obstructing and retarding the passage of the mails of the United States, or in restraint of trade and commerce among the several states. The government claims, however, that the concerted action on the part of the American Railway Union had something more to it than merely advising its members to quit work. It is claimed that the language of the telegrams,

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to which reference has been made, indicates that it was the purpose of the strikers to prevent the movement of railway trains belonging to the Southern Pacific Company, by actual and unlawful obstruction; and in this connection the question will arise in your minds, if these telegrams were intended merely to advise members of the American Railway Union to quit the service of the company, why did they not so state that purpose in plain language? It would have been an easy thing to have said, "We advise you to quit work." Why, then, telegraph such instructions as these,—if these telegrams were sent: "Stop all Pullman sleepers." "Tie up everything." "Hold Nos. 4 and 2 sure." "Tie up strong." Furthermore, if it were simply the purpose of the American Railway Union to advise its members to quit work, why did Mr. Knox use this language in his statement of the situation to the Citizens' Protective Association of Sacramento on July 7th, last? "Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with." Why did Mr. Mullen, on the same occasion, say "that this was a fight between capital and labor, and that from the chief justice of the United States, down through all the branches—judicial and legislative departments—of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation"? And why did Mr. Compton, at the same time, say "that the A. R. U. organization would not resort to any desperate means, so long as the railroad company would deal [735] with them without using armed force"? Was this language used on those occasions consistent with the peaceful and lawful methods of procedure now claimed by Mr. Knox to have been the purpose and action of the members of the American Railway Union during the period of the strike?

But it is claimed by the prosecution that the purpose of the strikers to interpose actual and unlawful obstructions

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to the movement of railway trains, both passenger and freight, is further shown by certain acts alleged in the indictment and concerning which testimony has been introduced. I will therefore now direct your attention to that feature of the case.

One of the means alleged, in the indictment, that was adopted to promote, carry out, effect, and execute the conspiracy, was (1) that the conspirators were to "forcibly take and keep possession and control of all yards, depots, tracks, and trains of cars on said lines of railway and to forcibly hold and detain the same."

SACRAMENTO.

The following testimony relates to what occurred at Sacramento, and it is claimed that it tends to prove the feature of the charge now under consideration:

Felix Tracy, agent of Wells, Fargo & Co. at Sacramento, called for the government, testifies on direct examination that: On the 27th of June, train No. 84, which ran from Sacramento to San Francisco by the way of Stockton, on which the express was, was held in Sacramento, and not sent out. The main office in Sacramento was at Sixth and K. He went down to the depot office to ascertain why it was not sent out. He ascertained that the train was not going out, and that the express was held there. The express was taken out of the train and held until they could send it away by different modes of conveyance. The express matter was destined for points between Sacramento and San Francisco, also Los Angeles; and matter for New Orleans also goes out on that train, connecting at Lathrop or Tracy. He could not tell positively whether there was or not any express matter on that train for New Orleans without examining the record. On the morning of the 29th, the express on train No. 4, which is the overland train from the East by the way of Ogden, was held at Sacramento, and he transferred the express from this train to the steamer. Sent it from Sacramento; that is, that portion of it for San Francisco, down on the steamer from Sacramento. This train was held at Sacramento about 10 o'clock in the morning. His recol-

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lection is that there was some freight or express matter on this train from New York for one place. The witness thus relates the manner in which he transferred this express:

"I saw that the train was held there and not moved. I saw a large crowd there, and the time for the steamer to leave Sacramento was about ten o'clock; that is, the regular time. I was satisfied, if I was going to get that express to San Francisco, that I must act very quickly. I did not know whether the steamer would be permitted to leave, or whether I would be permitted to transfer the express from this car to the steamer. Consequently I ordered two wagons—the large two-horse wagon and the single wagon—to [736] the express car, with the idea that we might carry that express up to 6th and K. * * * I did not tell only one or two employes. I did not state to them what I was going to do. We loaded it in as quick as we could, and took the express over to the steamer, and transferred it to the steamer. There was a great deal of excitement both at the depot and the steamer landing. I heard men at the steamboat landing ask the employes of the steamer not to go out.

The witness further states: That a train which left San Francisco on the 28th of June was delayed at Rocklin. He sent up several days afterwards, and had the express brought back to Sacramento, and he saw himself that there was express there going to Ogden, and east of that, from San Francisco and other points. He saw the waybills. With reference to the detention of train No. 84 on the 27th of June, as testified to above by Tracy, Mr. Knox gives the following version of the cause of its detention, which I have heretofore referred to in another connection: He states that there was a train due to leave there at 10:25, known as No. 84. They asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. They thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. As to the detention of train No. 4 on the 29th, Mr. Knox testifies, in substance, that Mr. Saulpaugh, the engineer, declined to go out on the train, and that the fireman also refused to go with the Pullman cars, and that this was the cause of its not going out.

Barry Baldwin, United States marshal, who was at Sacramento from the 1st of July until the middle of August, called

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for the United States, testified, on direct examination, upon being asked in what condition the tracks and the cars and engines in and about the depot at Sacramento were on the evening of Sunday, July 1st, that they were in great disorder. Engines were driven head to in places, and wheels blocked, and obstructions—cars—placed across the tracks. The cars were placed in such a manner as to impede the business. Saw no steam arising from any of the engines. They were in such a position that the trains and engines could not have free movement. Mr. Knox denies the truth of this statement, and in answer to the question: "Q. What was the condition of the yard?" says:

"It was simply trains had been run in there, and the men refused to put them away, because they would not work until those men had been reinstated, and they simply died on the track of their own free will. No one injured them at all. So far as any obstruction on the track, there were none at all, except that one block I spoke of under that engine to keep her from running down hill into another engine."

Mr. Baldwin further testified on his direct examination that the depot was constantly overrun with men; that it was in the possession of the strikers. Mr. Knox states that this is not correct; that the depot was in the possession of the railroad officials all the time. [737] Mr. Baldwin further states, in relation to the effort made on July 5th to couple the engine to delayed train No. 4, that it was standing on the track. It had come in there and had been stopped there. In the morning before commencing at all, he went to the mail car, and saw the postal clerk there, and made him open the car, and went into the car, and saw that the mail was there in the car, and that it was the mail that was ordinarily carried on that train, and had come down from the post office, and that is the way he ascertained. The crowd surged in through the depot. The crowd was heaviest around the engine, and standing in the way of the engine, and obstructing its coming up to the train. He had to get down and move them foot by foot to get the engine through. He got on the engine again, and it was moved up to the train, and, just as they reached the train, the crowd broke past and swept through the depot, and broke the train and rolled back the cars,—the passenger coaches. There were some seven cars rolled back. Possibly 500 people took part in rolling back these coaches. They

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rolled them back at once with their hands, without any difficulty, there were so many of them.

Greenlaw, a witness for the defendants, testifies: That he heard cheering and hollering down at the east end of the depot. That he went down there. That when he got there the Pullman cars had been uncoupled. That there was quite a crowd around Marshal Baldwin when he got there. That he saw they were trying to get at Baldwin, and he did his best to defend him. That a fellow—he thinks it was Jack Harris—picked Marshal Baldwin up and started to carry him out of the crowd. While he was up in the air on Jack Harris' shoulder he drew his revolver. He said, "Let me down." Jack Harris let him down on the ground, and he shoved the pistol up under Greenlaw's nose. Greenlaw states that he said: "Don't point that thing at me. I have been trying to defend you." Marshal Baldwin said: "I will shoot the first man that lays his hand on me." Just then Mr. Galliner broke into the crowd,—a great, large man,—and he said: "What's the matter, Marshal Baldwin?" or, "Baldwin." Baldwin said: "These boys won't leave me alone." Galliner then said: "Leave him alone. He is all right, boys. Go away and leave him alone." That the crowd then dispersed and went over to the depot and Third street bridge. Mr. Baldwin also further testifies: That on July 4th there were larger crowds at the Sacramento depot than on the previous day. Nothing had been done towards cleaning up the yard; no work had been done from the previous day up to that time. That an attempt was made on that day by the militia to take possession of the depot. That at the termination of the militia's efforts the depot was still in the possession of the strikers. That from that time on to the 11th of July, in the morning, the depot, grounds, and tracks and yards around the depot were in the possession of the strikers. The witness Greenlaw, called for the defense, contradicts Mr. Baldwin's testimony on this point, and states that there were more outsiders at the depot than there were strikers; that the strikers were doing the same that the crowd was,—looking on. No effort was made to [788] keep them out. They just stood there in the depot. He did not see the militia make any effort to get in. In

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relation to the stoppage of the movements of all trains between the 3d and 11th days of July, Mr. Baldwin states that there was nothing moved out (of the Sacramento depot) between those dates.

RED BLUFF.

The following testimony relates to the possession taken by the strikers of the yard, depot, and trains at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, called for the government, testified as follows: That he was roundhouse foreman at Red Bluff for the Southern Pacific Company in the months of June and July last; that he recollects an attempt to move the Sacramento local No. 12 from Red Bluff on or about the 29th day of June last; that it was composed of the day coach, smoker, and mail car; that he and Mr. Jones and Mr. Robb, the conductor, endeavored to move this train. After explaining the position of the train on the track by means of a diagram on the blackboard, he states:

"We were on the back of the mail car,—myself, Mr. Jones, and Robb. We set the levers to couple on. When we got very near there, Mr. Ray threw one of the levers down onto the coach, so that we could not couple it. There was Ray, Clodtfelder, and Shepler. He told us we could as well give it up. We had done our part, and they would do theirs. That we could not couple that train together. Clodtfelder was the man that made that remark. We stayed there and talked quite a while. Mr. Robb made the remark they were too many for us. We could not make it up. We would have to give it up. The engine stood there for about an hour, and the engineer brought her back to the roundhouse. The mail car stayed there a few feet away from the coach, not coupled."

J. P. Heaney, a witness called for the defense, testified: That he was a brakeman for the Southern Pacific Company in June and July last. That he belonged to the Brotherhood of Railroad Brakemen and the American Railway Union at Sacramento. That he went to Red Bluff on the 28th of June. The following morning (the 29th) he went to the depot. As he turned the corner he saw no engine there. He walked along leisurely, and when he got down to the depot he inquired why the engine was not out. He was told that a strike had been declared. He saw the fireman, and asked him what he thought about it. The latter said he did not know. The witness said: "Will we go, or will we not?" and he told the

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fireman that he would like awful well to go, but that he would hate to go into Sacramento and have the boys holler "Scab" at him when he got there. That he would not do that for all the jobs he ever saw. That they talked around there a little while, and finally concluded not to go out. He took off his cap and uniform and gave the job up then. He was told that they were obstructing the mail; that that was a mail train. In answer to the question, "Who told you that?" he states:

"I don't know. I think it was some of our men who spoke to me about it. I think it was Montanya and Harper. They said it was a mail train, and we ought to go on it. I says: 'All right. If it is a mail train, we will go.' I went down and says: 'I will go with the mail car, and nothing else.' I [739] told Mr. Jones and Mr. Robb so,—that I would go with the mail car. I spoke to the fireman about it, and asked him what he thought. He says: 'Yes, we ought to go with the mail, anyhow.' I asked him to get the engine. He started to get the engine, came down,—the train was in on the side track,—and I let the engine in, and went up and cut the mail car from the coaches, and backed the engine up on it, coupled on, and pulled out on the main line. Put my uniform on again, and told Robb and Jones that I was ready to go. They said that I could not go with that train; to put the whole train on, or there would be nothing go. I says: 'That is all I intend to go with. If you won't let me go with that, I won't go.'"

J. C. Shepler, called for the defense, admits that he was present upon the occasion, on the morning of the 29th of June, related by the witness Day. He states that he had nothing to do with the uncoupling the mail from the rest of the train,—the Sacramento local No. 12.

The persons Ray and Clodtfelder, who are implicated by Day in the uncoupling of train No. 12 on the 29th of June, were not called as witnesses.

Day further testifies, with relation to the stoppage of the Oregon express, train No. 15, on the 1st day of July: That he was not down at the train when she came in. After she was there a little while he went down. He saw the train had been cut in three different parts. This was somewhere about 9. He went down to the rear end of the train to see Mr. Kilburn. He saw the two sleepers were cut off and backed down over one crossing, the two coaches and a tourist car were cut in another section and standing on the crossing, and the two mail cars and engine standing in front of the depot, on the main track. At the south end there were two Pullmans; next came a tourist car, day coach, and smoker, and an ex-

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press car and baggage car was with those coaches and smoker, and the next was two mail cars and engine,—one a mail car and the other a box car. Men were working there taking off the appliances for connecting the train. He saw Mr. Shade there at work; also saw Richard Roe, and a fireman of the name of Hill. Hill's first name is Joe. Mr. Heaney was around there. He did not see him doing anything. There was probably a couple of dozen around there. He saw Mr. Shade and Clodtfelder cut the hose and the Miller hooks behind the mail car. They did that in his presence, when he went down to get the engine to pull her up. He looked at the couplings in the afternoon. He saw the safety chains taken off, and the nuts and keys at the back of the Miller hooks had been taken off.

J. C. Shepler, the same witness whose testimony has been previously referred to on the part of the defense, denies that he assisted in taking any nuts or chains or bolts, or in any way interfering with the Portland express which came in on the 1st of July; that he saw no one in any way interfering with the couplings or brake chains, or any of the nuts or bolts connected with the train. He admits, however, that he saw a couple of chains lying on the ground there. He admits, also, that he was at the station when the train came in, and that there was a crowd about the train. He states that he does not know who uncoupled the train.

Joseph B. Hill, called for the defense, and the person referred to by the witness Day as the fireman who was engaged, with others, [740] in taking off the appliances for connecting the Portland express on July 1st, states that he was present when the express train came in; that there was quite a crowd about there. He denies that he ever did anything to prevent the coupling of the engine and mail car to the coaches of the Portland express.

J. P. Heaney, called for the defense, testifies that he was around the depot on the 1st of July when the Portland express came in, or shortly after it came in. He gives the following version of the uncoupling of the train:

"Mr. Jones came up there and wanted to know if we would put the train away. I believe I spoke up and said that we would put the train away if he would tell the engineer to obey our signals. He said he

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would. He went up there and told the engineer. After he told the engineer, we gave him a back-up signal, and cut the train in three pieces, so as to clear the different crossings there. There are three crossings there that have got to be cut. If we would run the train all down there, we would stop the wagon transportation. We cut the train in three pieces, and let it stand there."

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified that on June 29th an attempt was made to move the Red Bluff and Sacramento local. This train carried coaches, the ordinary baggage car, and a mail car. It carried no sleepers. This train is due to leave Red Bluff at 5:15 in the morning. He attempted to move the train. The strikers had cut the train in two,—cut the mail car off. He could not say who cut it off. He did not see them cut it off. He attempted to put it on again and start the train in regular form. Mr. Clodtfelder and Mr. Ray prevented him from coupling it. Mr. Day and Mr. Robb, the conductor, assisted him in trying to put that train together. Mr. Day is the foreman of the roundhouse. They backed the train together. He set the Miller hooks to couple; set one of them to couple, and stepped over to the other platform to couple the other hook. Threw the lever up, as it were. Clodtfelder held it and prevented him from doing it. Mr. Ray got onto the other platform and threw back the other lever, so that it would not couple. The effect of this was that they could not couple the cars together. They were endeavoring to couple the mail car and the coaches. The mail and express and baggage were all in the one car at that time. He knows that that train had not been cut in two in that manner under the authority of the company. At the time that he endeavored to put this train together, Clodtfelder told him: "You cannot couple this train. You have made your attempt. You have done your part. Now we will do ours." The witness told him that his overpowering force—there were 50 to 2 of them—prevented them from coupling it. There was quite a large crowd about at that time. They were all opposing the railroad. They sympathized with the men who were stopping the train. They refused to assist the witness in starting the train, although he called on quite a number of them. They said they would not move any trains until the matter was settled.

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Clodtfelder and Ray said that the mail car could go. He thinks it was Clodtfelder who said that, or Demmick. Demmick was one of the leaders. They said the mail car could go by itself; no other cars of any kind,—Pullmans or day coaches,—none but the mail car. [741] Knows a man named Joe Hill. He was a fireman. He was on strike at that time. He went to couple this train together on the morning of the 29th. Hill also took an active part in preventing that. As they started the engine and mail car to couple onto the coaches, Hill tried to apply the air. By "applying the air" the witness means that he opened the automatic air valve of the air hose at the rear of the mail car. That would set the brakes if there had been air enough on the car, but there was not enough pumped, and they went ahead.

As previously stated, Hill denies that he interfered with this train in any way.

It is to be noticed that this testimony of William H. Jones is corroborative of that of J. C. Day, the preceding witness.

SOUTH VALLEJO.

The following testimony related to the possession by the strikers of the yard, tracks, and trains at South Vallejo:

Michael Keefe, yard engineer for the Southern Pacific Company at South Vallejo, called for the United States, testified as follows:

"The engines and yards of the Southern Pacific Company on the 10th and 11th of July were not in a condition for service. All the engines were killed; there was no steam in them."

The same witness further testifies:

"The number of my engine was No. 1. It was a switch engine. Some men took the engine away from me. One of them was Thomas Kelly; another was named Laurie; another was named Smith; another Hale. These men ran the engine off an open switch. They ran it off the track. This was on Tuesday, July 10th; about that time. They then hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose."

It would be hard for him to state the particular parts each man played. He did not exactly locate them at the time, or what they were doing, because he was talking with them. He tried to get on his engine. He got on the side. They

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would not let him get on. He thinks it was Smith who would not let him get on. He prevented him getting on. Kelly was a fireman for the company up to the time of the strike. He was out on strike. Laurie also went out on strike. He was a fireman. Smith was a stranger to him. He was the man that came there. Smith and Hale were the ones that came to Vallejo and made that trouble. Does not know where Smith came from. Thinks Hale told him he came from Folsom. Thinks Hale said he was a baggage man, a train man. He did not say why he came to Vallejo. The same witness further testifies that on the following day, he thinks it was, engine 1,190 was killed at South Vallejo. She came from Calistoga that morning. She pulled a mail train. Does not think that there were any Pullman cars on that train. He saw the engine killed. He was on the engine. He ran the engine. Smith came there, with a good many others, and took the engine away from him, and killed it. They took it right [742] on the main track. They put the fire out, also disconnected the hose, and let the water out; also out of the boiler.

SAN JOSE.

The following testimony relates to the possession taken by the strikers of the depot, yard, tracks, and trains at San Jose:

James Hewitt, called for the United States, testified: That he was the engineer of the San Jose train No. 19, running between San Francisco and San Jose. That he left San Francisco at 5:10. Was due at San Jose at 7 o'clock in the evening. That it was a mail train, having a combination mail and express and baggage car. That it carried no Pullmans. That he arrived on time. Going into the yard, people rushed from the depot onto the track, and he had to stop. This happened about 400 or 500 feet this side of the depot. The people rushed up the track, and he had to stop or else run over them. Knows a man named McClintock, and also a man named Runyon. When he stopped, Mr. McClintock came up on the front part of the engine, and came through the window on the left-hand side. The window was open. He came in and stepped over to him, and says: "I will take charge of this engine, Jim." Then

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Hewitt said to him: "Harry, you have got the main track blocked. This is as far as I am going. Let me put this train on the side track and put the engine in the round-house." Mr. Runyon stepped up and said: "No, sir. We will kill her right here." During this time there was a deputy United States marshal on the engine with the witness,—one on each side in the gangway. They tried to keep the crowd off. They overpowered the one on the left-hand side. McClintock asked him what business he was doing there, or what he was doing there. He said he was a deputy United States marshal, and showed him his badge. At that time they were trying to get hold of the fireman. McClintock, after he asked him to show his authority, which he did, says: "We can't help that. Boys, take him away." They took the fireman off of the engine. That left the witness and McClintock and Runyon on the engine, and a lot of boys came up over the baggage car and came up on the tender. After that the witness had some conversation with McClintock with regard to putting the engine away and putting the train on a side track. He told him they had the main track blocked. It was not necessary to hold him there. Wells-Fargo's agent stepped up on the right-hand side, spoke to McClintock, and asked him to pull the train down to the crossing, where they could get out their express, mail, and baggage. He says: "All right. Boys, cut off the baggage car." Which they did, and pulled down to the crossing or over the crossing, right in the front part of the depot, and stopped the engine there. One of the gang says: "No one shall move this engine but McClintock." The witness sat down on the fireman's side, and took hold of the bell cord. They got down to the depot. McClintock told him he had better get off and go home; that he would not be responsible for his life. The witness said: "You never mind about my life. I guess I can take care of myself." They got the engine as far as they could get her.

[743] W. S. Runyon, the person referred to by witness Hewitt in the testimony just quoted, was called on behalf of the defendants, and testified, in brief, that he was a locomotive fireman in the employment of the Southern Pacific Company in June last; that he belonged to the Brotherhood

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of Locomotive Firemen, and also to the American Railway Union; that he was a member of the executive committee of the American Railway Union in San Francisco; that during the strike he went to San Jose, on the evening of July 5th; that he went there of his own accord, to suppress any acts of violence or any deeds of violence that might possibly be committed there, as he understood there were some very troublesome people in that locality. His statements as to what took place at San Jose, and his connection therewith, in his own words, are as follows:

"I left San Francisco shortly after five o'clock of the evening of July 5th, and got onto the train here in San Francisco, and rode until we got to San José. As we were going in the yard at San José, the train slowed up slightly, and when about midway between the roundhouse at San José and the depot she came to a standstill. The people in the coaches commenced to get out. I, in company with a Mr. McQuade, of the Southern Pacific, got out. There was a large delegation of people on the tracks and around the depot. Q. What was done? State what you saw there,—what occurred. A. As I said, the train stopped. I got out, in company with Mr. McQuade, and stood on the outskirts of the crowd. They were doing a lot of scuffling around one place and another, and talking, and so on, and finally a remark was made that they would do Hewitt up,—the man who had charge of the train. I edged my way through the crowd. In the near vicinity I saw a number of men who had those white ribbons on their coat lapels. I said to them: 'I am what you ordinarily term a "striker," and a member of the A. R. U. As you are sympathizers with us, I should like to get your assistance to suppress any violence that might be perpetrated on Mr. Hewitt.' I got up to the engine, and, as I did, those gentlemen followed me. I says to Mr. Hewitt: 'You need not have any fear of doing you up, Jim. If I can possibly lend you any assistance, I shall certainly do so.' He was in a very excited condition; about as pale as my shirt bosom is at the present time. After a while the engine and the train was run down to a crossing or street just north of the depot. They stopped, and cut off all the coaches, with the exception of a combination car that they have for baggage and Wells-Fargo's matter. After they severed the connection between the baggage and smoker, the engine and baggage car went on the south side of the depot, to leave this here crossing clear. Mr. Hewitt changed his overalls. When he left his engine I stepped down behind him. As I did so, the other gentlemen who had the white ribbons on, and who I asked to accompany me, came along, and we walked alongside of Mr. Hewitt until he got through the crowd, and then he left. While he was walking through the crowd they jeered at him some, but there was no acts of violence. After Mr. Hewitt got away there was quite a number of men on the tender of the engine,—men and boys,—upon what is termed the 'running board.' I got them to disperse and leave the engine alone."

The witness admits seeing Mr. McClintock there at that time. The testimony of Mr. Hewitt as to what took place at the engine being read to him, he stated that some of the statements were correct and others not. He states that Mr.

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Hewitt suggested putting the train on the side track. He testifies that the statement said to have been made by him, viz.: "No, sir. We will kill her right here,"—is false. He states that there were several thousand people at that time there. In answer to the question: "Q. Hewitt states here that you and McClintock were trying to get hold of the fireman,"—he replied: "He is a liar. I did not. I had nothing to do with the fireman, and [744] did not see any one pull him off the engine at all. The fireman was off of the engine five or six minutes before I got on the engine."

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (2) "by causing to be assembled, and by assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places on said lines of railway, in said state and Northern district of California, and by gathering in great numbers in said yards and depots, to wit, * * * and other places around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains."

SACRAMENTO.

The following testimony relates to the assembling of crowds at Sacramento:

Felix Tracy, the agent of Wells, Fargo & Co., testified on direct examination: That there were no trains moving after the 29th of June. He saw a good many men down there at the station that were not at work,—railroad men. He saw them there, and he saw them in other parts of the city. There were more people at the depot from the 28th or 29th of June, up to the time of the United States soldiers going there,—some time about the 10th or 11th of July,—than usual, a good many more than usual. There were more there on the 3d of July, more there on the 4th of July, than it was customary to see there. He noticed that whenever he went down there. It will be remembered that Mr. Baldwin's testimony that there were crowds around the station is to the same effect. On the other hand, Mr. Knox denies emphatically that the depot was in the "possession of the strikers."

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Mr. Baldwin, United States marshal, testified on direct examination that the station and the tracks were overrun with people,—people in the cabooses and cars, and around them, sitting on the steps.

Mr. Knox admits this, but denies that he or his committee of the American Railway Union had anything to do with their coming there.

James Sims, called for the defendants, testified that the American Railway Union committee used one of the cars as an office on the 29th of June.

Mr. Baldwin further testifies, as to the crowd around delayed train No. 4, on July 3, 1894, that they were on the track and across the track, and they would not move out of the way of the engine. He had to get down from the engine and get in front of the engine and push them back and move them back, and the engine came foot by foot. They were threatening, and one man threw a rock at them. The same witness further testifies that he was at the depot subsequent to July 3d, and that the strikers continued to occupy the depot grounds. Being asked how he knew they were strikers, the witness stated that there was a crowd there. He was around among these men, and they were constantly informing him that they were strikers,—that they were employes of the railroad [745] company out on a strike. He was constantly talking with them, and walking among them, and they would address him and talk about the disturbances. That is the way he ascertained that they were strikers. The crowds never left. There was always more or less of a crowd of men there, night and day. With reference to the character of the crowd that was there late in the afternoon of the 6th of July, he states that they were strikers. Some of them said they were there to protect the property of the railroad company, and take care of it; and they were around on the cars, and it was the same crowd in character, except that they were men. The cars of the railroad company were being occupied by men, by strikers. Some of them were occupied apparently for sleeping quarters. They occupied cabooses on the tracks in the yard.

Thomas Compton, one of the mediation committee at
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Sacramento, called for the defense, testified that they "had our men stationed from one end of the yards to another, to see that the men did not get excited and do any damage to the property, and requested other men who came in on trains not to go out any more."

C. E. Leonard, a city trustee of Sacramento last June, and in the employ of the railroad company before the strike, testifies that there was a very large assemblage of people at the depot of the railroad company on the 3d of July.

SAN JOSE.

The following testimony relates to the assembling of crowds at San Jose:

Frank Arnold, a railway postal clerk on the route from San Francisco to San Luis Obispo, testifying as to the crowd at San Jose, says on direct examination that there were several thousand people around the train that came in on July 5th. They were all around the train,—inside of it, on the platform, swarming all over it. On cross-examination he says that they were occupying all the spaces in the depot, on the railroad car platforms, and so on.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (3) "by threats, intimidations, personal assaults, and other force and violence, to prevent the engineers, firemen, conductors, brakemen, switchmen, and other employes of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways."

SACRAMENTO.

The following testimony relates to threats, intimidations, and acts of violence at Sacramento:

Mr. Baldwin, speaking of the strikers at the Sacramento depot on July 3d, testified on direct examination that they were threatening, and there was one man that threw a rock at them. It struck the cab of the engine, just below where Mr. Clark was standing—between Mr. Clark and himself. He further testifies that there were crowds around the semaphore. The crowd was demonstrative at this time. There were men threatening them as they took the engine

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through,—hooting. He recollects one man saying, "I will fix you." He seemed [746] to be particularly addressing himself to the witness that time,—the people on the engine. Heard expressions of anger and defiance. They were angry.

Respecting this testimony of Mr. Baldwin, Greenlaw testifies that there was a good deal of yelling there. Some were "hollering." But he did not hear any threats made. He did not see any forcible means used to prevent the taking out of the train. No threats whatever were made towards Mr. Baldwin. He denies that he incited any people to do anything that day, or that he threatened Mr. Baldwin, or any one. He admits that he called some persons on the engine "scabs," but denies the statements imputed by Mr. Baldwin, in his testimony, to him.

While it is to be observed that Mr. Baldwin was not an employé of the railroad company, yet the testimony, if true, is significant with respect to the actions of the crowd towards Clark, the engineer, and the others on the engine.

Anthony Green, called for the defense, testified that he was captain of police of the city of Sacramento, and was such in June and July last; that he was present on the 3d of July at the depot; that he himself saw no acts of violence committed, but he admits, on cross-examination, that he did not see the cars actually shoved back by the crowd. He testified that he heard the crowd yelling at those who were in the cab of the engine that was being moved from the roundhouse to the delayed train No. 4; that such exclamations were used as follows: "Don't you go out;" "Don't you take that train out;" "Stand by one another;" "Don't be a scab;" "Don't take the places of those men who are working;" "Come out of there;" "Don't you take that engine out;" "Don't fire that engine;" "I appeal to you as a man;" "Come down out of there;" "Don't go out,"—and such questions as those, appealing to them; that he was in the cab himself several days, mornings and nights; that he stood in the first one.

RED BLUFF.

The following testimony relates to what occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern

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Pacific Company at Red Bluff, testified that he was not at liberty to go on the engine. He was told to keep away from the engine and let it alone. A brakeman by the name of Harper and two or three other men told him that. He does not know them. He thinks Harper was on strike. He was out with them. This occurred, according to the witness' testimony, on July 1, 1894. The same witness further states, after describing how engine No. 1248 was killed by Van Devinter, Richard Roe, and Harper, that he had a conversation with Van Devinter about the matter. He told him he was doing very wrong, and Van Devinter said he did not think it was any of his damned business what he was doing. They told him if he did not get out of the roundhouse they would have him carried out on a board. Harper made that remark. Richard Roe and Van Devinter, and one or two others he did not know, were present. This was at the time they were killing engines.

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SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running out between South Vallejo and Santa Rosa, whose engine was killed, testified as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. This was near 7:30 or 7:35 in the morning. It could not have been far from that. He was running the train,—conductor. He left North Vallejo, and between North and South Vallejo he found an engine on the main line. The engine was called a "killed" engine,—no steam in it. As they pulled up near that engine, a crowd of men came out and fixed theirs the same way. They were obliged to stop by this "dead" engine. He thinks he must have been very near on time. He makes connection, with passenger and mail cars, with a boat that runs between North and South Vallejo and Vallejo Junction. At Vallejo Junction connection is made with the San Ramon passenger train. It is a mail train that runs between San Ramon and the Oakland pier. He asked a man named

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Smith to let him couple on and push the dead engine on the siding, so that he could get the train down to the depot. This man refused to do it, saying he was there under orders, and had to obey his orders to stop the train where it was. Smith showed him a card with his (Smith's) name on it,—an A. R. U. card.

William James, fireman of one of the Alameda local trains, testified, in answer to the question, "Did you have any trouble at tower No. 2 that day?" as follows: "The train was stopped by a mob of men, and I was taken off the engine." He further states that about 75 or 100 men got in front of the engine. The engineer stopped when they gave him the stop signals. The crowd, all of them, gave signals,—all those that were on the track. He could not see who they were. They took him through the crowd, and wanted him to go and join the A. R. U. They took him half way to the roundhouse, he would judge about 400 feet. Engineer Willard came out and told them it was a free country, and he would go where he wanted to, and with that they let go of him.

Many witnesses on both sides have testified as to the personal assault claimed to have been made on Mr. James. The testimony is contradictory as to what actually took place at that time. I think, however, this feature of the case is sufficiently fixed in your minds to enable you to determine the actual facts of the case without any extended comments from me.

(With the usual admonition to the jury, an adjournment was here taken until to-morrow, Tuesday, April 2, 1895, at 10 o'clock a. m.)

TUESDAY, April 2, 1895, at 10 o'clock a. m.

When the court adjourned last evening, I was directing your attention to testimony tending to show the means conspired to be used in carrying out the conspiracy. First, I called your attention to the testimony tending to show, or to disprove, that the con- [748] spirators forcibly took and kept possession and control of all yards, depots, tracks, and trains of cars on said lines of railway, and forcibly held and detained the same; second, that they caused to be assembled,

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and assembled with, large crowds of persons in said depots and yards of said Southern Pacific Company at various points and places on said lines of railway in said state and Northern district of California, and by gathering in great numbers in said yards, and depots, to wit, * * * and other places, around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of said railways, preventing the movement and passage of said engines, cars, and trains; third, that by threats, intimidations, personal assaults, and other force and violence, they prevented the engineers, firemen, conductors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways. I will now proceed to direct your attention to the testimony tending to show other means conspired to be used in carrying out the conspiracy.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (4) "by forcibly disconnecting air brakes upon such trains,—mail, passenger, and freight."

RED BLUFF.

The following relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified on direct examination that the Oregon express reached Red Bluff about 4:30 or 4:35 in the morning of July 1st last; that it comes from San Francisco,—Oakland. Portland, Or., is its destination. She was on her regular trip. She was stopped at Red Bluff. The train was cut in two. The train came into the station, and they cut it in two; that is, they uncoupled it and uncoupled the hose. He was just passing there. He did not see the man who did it. There was a mob of men there. He elbowed his way through the crowd. As he passed, he heard the air holes pump as they do when they are open. The air was cut behind the mail car. The local cars followed first, then the baggage car, the express car, smoker, coaches, and Pullman. That is the way the train is made up. They all follow the mail car. They

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were all in the rear of the part cut off. The effect of that cut was to stop the movement of the train. That was about 5:30, a few minutes after they arrived.

Without repeating the testimony given by the defense, it is sufficient to say that the witnesses on their behalf, with reference to the Red Bluff occurrences, deny having had anything to do with the stoppage of the Portland express.

SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, testifying as to what occurred to his engine on [749] July 10th, says that they hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose. They ran the engine off the open switch. The testimony of this witness respecting what occurred to engine 1,190 on the following day has already been referred to under a previous head.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (5) "by putting out the fires in the engines, and drawing the same."

SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running between South Vallejo and Santa Rosa, whose engine was killed between North and South Vallejo on July 12th, called for the United States, testified, with reference to putting out the fires on his engine, as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. They pulled the fire out of the engine. They shut the water off first in the tank valve, and started to pull the fire out. He asked them to turn the water back first, and then pull the fire on the engine, which they did. He asked them to do

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that to keep from burning the engine. The effect of letting the water out of the engine with the fire in it, he thinks, would be apt to burn the bricks considerable.

WEST OAKLAND.

The following testimony relates to what occurred at West Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland testified that a number of engines were killed in and about the shops in the latter part of June and early part of July last. He could not give the numbers. There were 8 or 10 engines with fire in them, and the fire was let out of them, and all the engines were emptied that were full; that is, all the engines that were about the place were emptied of water,—water let out of them. This was done by the strikers.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (6) "by throwing switches, in order to prevent the passage of such trains through depots and stations."

RED BLUFF.

The following testimony relates to occurrences at Red Bluff with reference to delayed train No. 15 on July 3d last:

William Jones testified as to the throwing and spiking of switches as follows: That, after the Portland express which arrived at Red Bluff on July 1st stood there a while, the engineer said he wanted coal, and Mr. Day, the foreman at the roundhouse, and the witness, took the engine and the mail car, as it was coupled on,—two mail cars,—there was a freight car which they said contained mail. [750] It was with the mail car. It had United States mail locks on it. He did not see the inside of it. Mr. Monteith: "We will admit that car had mail." The witness, continuing, stated that they took it to the coal pile to give the engine coal. They passed over one of the switches in the yard, and while they were gone the switch was thrown and spiked to the side track, so that when the train backed down it could not back to the balance of the train. It was forced to go to the siding. The switch was opened. It was thrown off the

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main track to the siding, and spikes driven to hold it there, and the switch blocked. They could not have passed over it if it had been spiked. It was a switch in which the car could not go off the track. They could not have gone over it. It was not the case. The target was in its proper place and position. No orders were given by the railroad company for either the spiking of the switch or locking the switch. Such orders would come through him.

Charles F. Cadwalader, called for the United States, testifies that he saw Hehorn, Shade, Ray, and others spiking a switch on July 1, 1894.

W. H. Winter, also a witness for the government, testified that he saw the switch spiked, but the only person whom he can identify as having participated in the spiking is Hehorn.

Milton D. Clark, called for the United States, testified that he saw the spiking of the switch. He identifies Hehorn as the person who held spikes in his hand; Shade is the man who drove in the spikes; and that Ray was in the crowd with them.

John Kelly, a witness called for the United States, also testifies as to the spiking of the switch. He states that he was a member of the American Railway Union; that he was a fireman for the Southern Pacific Company; that he went out on strike at Red Bluff; that he did so because he was a member of the American Railway Union. He identifies John Shade as just in the act, when he saw him, of leaving with a spike-hammer and a couple of spikes in his hands. This switch, he states, connected with the main line. There were 30 or 40 men around there at that time. He gives the names of others, besides Shade, who were in the neighborhood of this switch, as Peter Ives, S. P. Roller, Jack Shepler, and Clodtfelder. He states that Roller locked the switch after it was spiked. As to the relation these persons bore to the strike, the witness testified that Roller was a brakeman, and that he was on strike at that time. He was an A. R. U. man. Ives was a car foreman up there. He was also on strike and an A. R. U. member. Clodtfelder and Shepler were on strike at that time. They are members of the A. R. U. Knows a man named Demmick. Knows a man named Harper. He (Harper) was there that morning.

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He is a brakeman, and a member of the A. R. U., and out on strike. Knows a man named Heaney. He did not see him there.

The persons referred to by the witnesses for the prosecution as having participated in the spiking of the switch, which prevented the engine and mail car of the Portland express from getting back to the passenger and Pullman coaches, or, more strictly speaking, those [751] who have testified, deny that they have been guilty of the acts charged, or did anything in any way which contributed to the spiking of the switch.

SOUTH VALLEJO.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, called for the government, testified that on July 12th last he was making up a passenger train for Calistoga and the vicinity; that it was a mail train, and that it did not carry any Pullmans. He took the engine and made up the train with it, to get ready to go out again. He was going to the roundhouse with the engine. He saw a gang of men. He thought that he would get to the shops before they took the engine away from him. The switch was set for the side track. He would have got to the shop, he thinks, but this man closed the switch on him, so he stopped. Had he gone on he would have run off the track. It was an open switch. The crowd remained there. The engine was killed after that, and was there a day or two.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (7) "by opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railways were situated."

SACRAMENTO.

The following testimony relates to what occurred at Sacramento:

T. W. Heintzelman, a master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the

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United States, testified that he experienced some difficulty, on June 29th, in attempting to get train No. 4, which is a mail train, and came from Ogden, out of Sacramento,—in attempting to get her through. He testifies that he was requested by his superintendent, Mr. Wright, to back up the engine and mail car and express car,—he thinks it was coupled to the engine,—to couple on to the balance of the train that was left in the upper yard, and pull it down the depot. He did so. While pulling the train down in the depot, something was thrown at him while he was on the engine. After he saw what it was,—it proved to be a monkey wrench,—he got the train down to about its usual stopping place, and stopped there. After considerable persuasion he got the engineer and a fireman on the engine, and got the train started. The train had not moved a great ways—about 50 yards—when the drawbridge was swung open, and the train had to stop. This is the drawbridge across the Sacramento river. There was no vessel in sight to occasion the opening of the bridge. It was opened only for the purpose of stopping the train at that time. There was quite a crowd running down by the drawbridge just prior to the time it was opened.

Mr. Knox gives the following version of what transpired respecting the opening of the drawbridge: He says that on the morning of the 29th No. 4 came in. He guesses she got in about 6 o'clock,—somewhere around there. She came in with an engine, mail, bag- [752] gage, and express car. He went to Mr. Saulpaugh,—he was the engineer that was going out on that train,—and asked him if he was going to do any switching there. He said no, he was not; they would have to get some one else to do their switching. Mr. Wright came down there when they were talking, and asked him if he would back up to Sixth or Seventh street, he believes he said, and get the balance of the train. Mr. Saulpaugh suggested that it would be a pretty good idea to get Mr. Clark or Mr. Heintzelman to do that. They sent for Mr. Clark. The witness here stated that before this strike was ordered it was an understood thing with Mr. Wright and the committee that they should do all in their power to prevent any damage being done. On his (Wright's) side he was to give them

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permission to talk to the crews, engineers, conductors, firemen, and brakemen, and see if they could induce them to stay with them. When Mr. Clark came over they had the right to talk to him to see if they could induce him not to back up to get the cars. After they talked with him a while he turned around and said he did not want any of this in it. They simply asked him if he wanted to scab on his own son. His son was working there. He said he did not want to have anything to do with this, and turned around and went away. Heintzelman came, after some time, got up on the engine, and the first thing Knox saw was a monkey wrench coming out of the engine, which pretty nearly hit him. They backed up. While they were up there, he, with the balance of the committee, went through the shops, to notify the men that the strike had been decided on. While they were going through the shops a man was sent over after them to tell them that the drawbridge was open, and to ask them to come and see if they could not get it closed. He ran over there, and sent some men out in a boat to close the bridge,—Mr. Hatch and Mr. Jefford, and two or three more. They closed the bridge, and he went back and told Mr. Saulpaugh that the bridge was closed. After the bridge was closed, he told Mr. Hatch to go up to Mr. Wright's office and get a lock,—a Yale lock,—and put it on there, so that the bridge could not be opened. Mr. Hatch went and got the lock and locked it on the bridge, so that they couldn't open it.

Both Hatch and Jefford corroborated Knox with respect to the latter's statement that he sent them to close the bridge, and Hatch, further, as to the lock being procured at Knox's instance, and being placed by Hatch on the bridge.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (8) "by burning and destroying bridges, trestles, culverts, over which such trains necessarily and usually would pass."

TRESTLE NO. 2, NEAR SACRAMENTO.

The following testimony relates to the wreck of train No. 4 at trestle No. 2, near Sacramento:

Mr. Baldwin, who saw the wreck of the delayed train No. 4 at trestle No. 2 about two hours after it occurred, testi-

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fied on direct examination that the baggage and mail cars were off the track. When he says "baggage," it might have been express cars with the baggage. [753] One mail car was badly damaged; also a baggage car badly damaged; also two mail cars slightly damaged. These cars were on the side, smashed over. Some of them had reached the water. He made an examination of the trestle. The engine apparently had gone probably three or four car lengths before it went off the trestle. The trestle is about 300 or 400 feet in length. He found that the east end of it, especially the north side, was badly smashed in, as though the bridge had been weakened and smashed down; the bents slivered up, the ties all broken very much more on that end of the bridge than further along, right at once where the engine struck the bridge. The trestle was very badly crushed in on the east side, towards Sacramento, immediately where it joins the track, the embankment, two or three car lengths from where the engine lay in the water. Then the train lay all along the trestle on to the embankment. The trestle, where it joined the embankment, was very badly slivered; there was only a piece of about six or eight inches where the ties were solid enough to walk on. The trestle was all crushed in below the ties at that corner.

The testimony of Mr. Baldwin tends to show that the trestle was blown up, and that delayed train No. 4 was wrecked. I will not take up your time in reading to you all the testimony introduced by the prosecution tending to show that the trestle was blown up by members of the American Railway Union, and was a part of the conspiracy to obstruct and retard the mails, and restrain interstate commerce, nor such testimony as has been put in by the defense contradictory of such design, or as to the participants engaged in such affair, or as to being or playing any part in the policy or plan of the members of the American Railway Union in carrying on the strike between themselves and the Pullman cars. The details of this unfortunate catastrophe, as told by the witnesses on the stand, are doubtless fresh in your minds. The testimony tends to show that a train was made up in Sacramento on July 11th last for Oak-

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land, to be sent by the way of Davisville. It left Sacramento a few minutes past 12 o'clock, under charge of Conductor Reynolds, with Samuel Clark as the engineer and Danicamp for fireman. On the train was postal clerk J. A. Brown, in charge of the United States mail. Lieut. Skerrey and a number of United States soldiers were on the train for its protection, some of the troops being on the engine. The train consisted of four mail cars, baggage, passenger coaches, and a Pullman. About two miles west of Sacramento, in crossing trestle No. 2, the engine and four of the cars were thrown from the track into the slough. Clark, the engineer, and four soldiers were killed. The jurisdiction to try and punish the parties who were guilty of murder in this dastardly affair belongs to the state. It is only for you to ascertain who were the parties to the conspiracy that brought about this terrible result, that you may determine who were responsible for the minor offenses involved in the stoppage of the United States mails and interstate commerce. You will recall the testimony of the boy Sherburn, who drove the wagon carrying Worden and others out to a point near trestle No. 2 just prior to the time [754] the wreck occurred, and the testimony of Knoblauch, Reed, and Winney as to the declarations and conduct of the parties who, the testimony tends to show, were sent out by the American Railway Union along the line of the road, and for a purpose. What was that purpose? To guard the road, or to wreck that train? It is for you to determine.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (9) "by loosening, removing, and displacing the rails of the tracks of said railroad."

TRESTLE NO. 2, NEAR SACRAMENTO.

The following testimony relates to the track at trestle No. 2, near Sacramento:

Mr. Baldwin, who testified that he saw the wreck of delayed train No. 4 shortly after the catastrophe, testified that he made a little diagram of the position of the rails. The north rail was swung over across the south rail. It appar-

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ently had been forced over, lifted over. He found there, right at the joint a nut, three washers, and two spikes. They were loose.

RED BLUFF.

The following was testified to as having occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, testified that the spikes and the bolts were pulled out of a rail on the main line. This was between 1 and 2 in the morning of July 1st last. He went to the coal bin, just a little ways from the turntable, to see if the coal bin was all right, and there were four men right across the other side of the fence, working at the rail. They had shovels there. He went to the turntable, and stood there talking to the fireman, when the four men came down with those tools in their hands. They came right from the direction where the rail was tampered with. He could hear them working with shovels, scratching away dirt and covering it up. He was not there more than a couple of minutes. He went back to the roundhouse. He saw John Shade, John Salstrum, Robert Lang, and George Werhing coming from this direction. Mr. Shade had a claw bar in his hand. Salstrum and Lang had a shovel apiece. He did not see anything in Werhing's hands. A claw bar is a long bar made in the shape of a claw, for drawing spikes. He examined that rail an hour afterwards, and found the spikes pulled from a rail and a half, the bolts taken from the fishplates and left lying on the ground. He put the bolts back himself.

J. F. Heaney, called for the defense, who was at Red Bluff on the occasion detailed by the preceding witness, with reference to the displacing of the rail states that he may know John Shade, Salstrum, Lang, and Werhing, but he does not know them by name; that he is pretty sure that they did not belong to the A. R. U. at that time; that they had no connection with him there.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (10) "by greasing the rails."

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RED BLUFF.

The following testimony was given as to what transpired at Red Bluff with reference to greasing of rails:

John Kelly, a fireman employed by the Southern Pacific Company prior to the strike, but who went out with the A. R. U., testifies on direct examination, as to the part he took, with other members of the A. R. U., in greasing the rails north of Red Bluff, that on July 1st, at about 3 o'clock in the morning, he was about four miles north of Red Bluff; that he was greasing the track; that there were with him Bill Ray, Joe Hill, Clodtfelder, and Archie Montanya; that Montanya is a member of the A. R. U.; that he was on strike; that they went about four miles further than Red Bluff, and greased the track, coming towards Red Bluff, for about three miles. This was done with engine oil. Both rails were greased. They just rubbed it on. There is a down-hill grade from Red Bluff, going north, for about a mile, and then for about three miles it is up hill. It is a pretty steep grade. They got the oil with which they greased the rails from the round-house,—from the oil tanks. They had oil cans from the engines, and buckets with which to carry it. They got through greasing about 4 o'clock. There was not any oil left in one of the tanks.

The witnesses J. C. Shepler, William Sheehan, and J. B. Hill all deny that they participated in, or know anything about, the greasing of the rails as testified to by the witness Kelly.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (11) "by stopping trains upon railway crossings, and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches."

SACRAMENTO.

The following testimony was given as to what took place at Sacramento with reference to obstructing one of the railway crossings:

C. A. Newton, night yardmaster for the Southern Pacific Company, called for the United States, testified on direct ex-

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amination that the three main tracks leading into the Sacramento depot were blocked with trains and engines from the 1st to the 11th of July,—blocked east, west, and south. One of the tracks leads in off the Western Division, called "South;" one leads off the Sacramento Division, called "East;" one leads in from the California Pacific, "West,"—that is called the "California Pacific Division." These tracks lead both in and out. The roundhouse is situated north of the depot. There are several tracks leading from the roundhouse to the main track. There is one track direct to the roundhouse from the main track, that one can go to the roundhouse straight from, without doing any switching. There is another track that one can switch in off the main track, and there are several switches to throw to get to the roundhouse. All of these tracks were blocked between the 1st and 11th of July. By "blocked" he means trains and engines were on the tracks. The engines were dead; they had no steam in them. Some of the trains were made up, and some of them, that were coming into the yard, [756] that were stopped on the main track. On Sunday, the 1st of July, the yard was in such a condition that trains could not pass through the Sacramento depot east or west. He knows the exact condition of the tracks on the 1st of July last. The main track from the west had, on the crossing leading to the roundhouse, No. 4 engine, just about to enter the crossing to go to the roundhouse. Then there was an engine that came in on No. 69, on the 29th of June. Both pilots came together right on the crossing. That blocked the main track to the roundhouse and another track, that we used to let freight trains up and down on, called the "old main track." Crossing Washington, which is on the other side of the river, in Yolo county, the coaches, the smoker, and the mail car and the baggage car stood there in Washington. One of the coaches was shoved part of the way in on a siding, and the other coaches run down against it. That blocked that track. On the Western Division there were some three or four freight and passenger trains down on the main track, mixed up, part on a siding and part on the main track. On the Sacramento Division the cars were sandwiched in every way,—off the track and on the track, coaches among sleepers,

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and fruit cars, and everything else. That made the blockade complete. As night master he has control of the movement of all trains and engines in the Sacramento yard.

The testimony of Greenlaw, Compton, Knox, and others is to the effect that they had nothing to do with this obstruction, and that the American Railway Union did not countenance, nor was in any way responsible for, it.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (12), "by compelling the employes of said railroad company to leave their trains, shops, and the work of said company while in the performance of their duties."

OAKLAND.

The following testimony relates to what occurred at Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland, called for the United States, testified on direct examination that men in his shops were prevented from doing any work. He cannot name any of the parties who prevented his men from working, but they had a machinist working in there, with a helper, and they were taken out by a crowd that came in there. He could not now recognize any of the faces of the crowd. The same witness further testified that the crowds that came in took out the men that they had to work there,—pushed them out of the shops,—they took hold of them with their hands and shoved them out. Cannot name or designate or identify any men who were forced out of the shops, who were forcibly prevented from working. Cannot identify the men by their employment in the shops. This was on the 4th of July. He saw four men pushed out. He saw the stationary engineer taken out. He was surrounded by a gang that were forcing him out,—telling him to get out. They put their hands on him. Referring to the persons who thus prevented the men in the shops from working, the witness stated that one would not see the same parties there [757] every time. In the forenoon there were probably 150 or 200 men. In the afternoon, about 4 o'clock, he should judge about 800 came in, and so it was. There were

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small bodies coming in frequently. These crowds were composed partly of strikers,—he would not say largely.

RED BLUFF.

The following testimony relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, called for the United States, testified that on the 4th of July he did not remain in the continued occupancy of the telegraph office at Red Bluff. The telegraph office is his office. It is under his charge. It is the railroad office, the railroad wires doing the business of the railroad company. Mr. Clodtfelder and Mr. Demmick took possession of the office, and ordered him and his operator out. This was at 9:30 of the morning of the 4th of July. He asked them what for. He was told, "We have decided to close this office, and we want you to get out," and they locked it up. He immediately had the operator cut out the instruments, and locked the office and left. Both Demmick and Clodtfelder are operators, and have run both stations. They were on the strike at the time. Before the strike they were brakemen. He regained possession of the telegraph office at 6 o'clock in the evening. They, Clodtfelder and Demmick, opened it for their own use at about 1 o'clock. He was notified that he could come back to the office. Mr. Harper, another brakeman,—a striker,—also a leader, notified him that they had opened the office for their own benefit, or their own use, and he could come there and see nothing was disturbed. He did so. He went down after about half an hour. Mr. Demmick and Mr. Clodtfelder, Mr. Shepler, Mr. Heaney, came in at one time. Those that remained there all the time were Clodtfelder and Demmick. They used the office. His operator was telegraphing for them. The lines were working, and they were using the keys. Clodtfelder and Heaney both told him he could have possession of the office. Then he took possession. The night operator comes on at 6 and they took possession of the office until probably half past 9 or 10 of the evening, when another gang came in and said they had decided to close the office, and out they

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went. The other gang were Frierson and Roller. Both were brakemen. They were on strike. He thinks there were others there with Frierson and Roller at that time. There were about 17 there after the station train had left for Sacramento,—about 15 or 17. He does not recollect who was there particularly, but those two men came to the office. They said: "We have decided to close your office." He asked, "For what reason?" They could not give any reason at first. They went out and consulted together, several of them, outside on the platform. They held a meeting. They came back, and he said, "Have you decided why you are going to close me up?" or "that you are going to close me up?" They said, "Yes, we are going to close you up for the same reason that you were closed this morning." That is all the reason they gave.

[758] J. C. Shepler, called for the defense, admits that the telegraph office was taken possession of by the men who were out on strike that day, and that he may have been there while it was in the exclusive control of those men, but he denies that he, with others, put Jones out, or told him he had to get out.

Finally, the indictment charges that it was sought to promote, carry out, effect, and execute the conspiracy "by using all such other forcible means as to them should seem expedient to prevent for an indefinite period the use of the said railway for the transportation of the mails of the United States and interstate commerce."

RED BLUFF.

The following testimony relates to Red Bluff:

MILLER HOOKS.

John Kelly, previously referred to as one who went out on the strike at Red Bluff, and who had been previously employed by the Southern Pacific Company as a fireman, called as a witness for the government, testified on direct examination that he recollects train No. 15 coming into Red Bluff about half past 4 (of July 1st last). The train was prevented from going on. The bolts were taken out of

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the Miller hooks. He only noticed Will Ray, Richard Roe (Joe Hill) engaged in doing this, and he was there himself. He noticed what they were doing. These men whom he has mentioned were members of the A. R. U. They were among the strikers. They took the bolts out of the Miller hooks, so that they could not pull the train, and marked them all, and put them in a sack.

Joseph B. Hill, the person referred to in the testimony of the witness Kelly, just quoted, was called for the defense, and stated that he was present when the Portland express came in; that he did not see any safety chains or brake chains taken off, nor did he see any one at work taking off bolts or nuts from that train. He states, however, that all this could have been done without his knowing it; that there was quite a crowd around the station at the time the train came in. He states that he did not see Ray there, nor Richard Roe.

DUNSMUIR.

The following testimony relates to Dunsmuir:

EJECTED FROM TELEGRAPH OFFICE.

James Agler, superintendent of the Shasta Division, from Red Bluff to Ashland, Or., called for the United States, testified as to his being dispossessed from the telegraph office at the station as follows: That he has a telegraph office at the station at Dunsmuir; that on the 4th of July, from 10:30 until 12:15 p. m., he was dispossessed. After detailing how a crowd of 30 or 40 strikers rushed into the office, the witness states that Conductor Seyler was the man who did the talking. He said: "We are in here, and we have got to have this office." He (witness) said: "I don't see how you can [759] do this." Seyler replied: "We have got to have it." That it looked a little shaky. Agler told the dispatcher: "You had better go home. It seems they want the office, and I guess they are going to have it." He went out. Agler passed out, and went upstairs to the resident engineer's office, and was upstairs there 25 or 30 minutes. The witness then goes on to state who was there, and whether those persons had been in the employ of the railroad company. To

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the question, "Q. Were these men who came into your office at that time then in the employ of the Southern Pacific Company?" he answers, "A. No, sir; they were not. Q. Of what class was the crowd made up? A. Employés; train men, car men, machinists of all the different departments. There was a large crowd of them. A Juror: Q. Men who had been in the employ of the company? A. Yes, sir. Q. They were not at that time? A. No, sir." The witness further states that after going upstairs he saw these people get the engine No. 1762 out of the roundhouse, which pulled the irregular train out of Dunsmuir. At 12:15 he was notified by them that they were ready to turn the office back to him. He thereupon went to the office. At 12:20 they pulled out.

DUNSMUIR.

The following testimony also relates what took place at Dunsmuir:

IRREGULAR TRAIN FROM DUNSMUIR TO SACRAMENTO.

The same witness (Aglar) testifies as to this irregular train substantially as follows: That on the 4th of July a train went from Dunsmuir to Sacramento. Did not know who ordered it out. Saw the engine getting out. Saw the train made up. It was not a regular train. Had an engine and two cars. The instructions from the railroad officials concerning the movement of trains came to no other person than himself. He states that he received no instructions from his superiors in the Southern Pacific Company concerning the movement of this train. The train went without his authority. Witness knew a good many men that went on that train. Some 45 left Dunsmuir on it. He saw one Seyler, Littlefield, Walthers, Roberts, Price, Parrish. These men had been employés of the railroad company up to the 28th of June. H. L. Walthers was running the engine. Conductor Seyler seemed to be in charge of her. He noticed guns in the car. He had a conversation with Seyler just before the train pulled out. He explained to him that the coach and engine that was carrying Mrs. Stanford from Red Bluff to Dunsmuir had the right of way, and that he did not want

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him to leave there with a train that he had no right to. Seyler replied, "We have received a message from Sacramento and must go there, and are going." Then they pulled out.

In this connection it might be well to refer to the following telegram, Exhibit No. 687, which reads:

"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

[760] It will be noticed that this telegram is dated on the same day that this irregular train in charge of Walthers left Dunsmuir.

Walthers, who was called for the defense, admits that on the morning of July 4th a message arrived in Dunsmuir, purporting to have come from Mr. Knox at Sacramento, asking the men to come down,—asking their assistance,—to come to Sacramento. Walthers testified as follows:

"The message was read to all those present, members and outsiders, men and employes in general, and they all signified their intention of going. They all said they would go, and they left in a body, went down there, prepared an engine and coach, met the mail agent, and told him we were going to Sacramento. I could not state positively whether we asked him to go with us, or whether he put the question."

He states that they had a number of guns on the train,—perhaps 35. He states that the train was running without any orders at all. There were no orders from the company to run the train. He further states that he does not think Mr. Agler could have stopped his train.

M. C. Roberts, who was the secretary of the American Railway Union at Dunsmuir, of which Walthers was president, testifies to substantially the same facts as Walthers.

You will also recall that there is testimony with reference to an irregular train from Truckee to Sacramento, which arrived at the latter place about July 4th; and another from Lathrop to Sacramento, on the night of July 10th. You will observe that, so far, I have not alluded to the testimony tending to show acts committed by the defendants at Palo Alto on the 6th of July, although the indictment brings that place within the range of such testimony as I have referred to tending to show the means to be employed in carrying out the conspiracy. I have, however, deferred reference to this testimony until we reach the consideration of the overt acts charged

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to have been committed by the defendants, when such testimony may then be considered in the double aspect, namely, as tending to show, not only the overt acts required to be established by the statute, but also as tending to show the means whereby the conspiracy was to be carried out.

I have now directed your attention to the testimony which it is claimed by the prosecution tends to establish the means whereby the conspiracy was to be promoted, carried out, effected, and executed; that is to say, it is claimed that such means were, in fact, used, and were part and parcel of the conspiracy; that the acts concerning which testimony has been given were unlawful acts, which entered into and became part of the crime of conspiracy to prevent the use of the Southern Pacific Railways in this district for the transportation of the United States mails and interstate commerce. I have, however, not attempted to exhaust the testimony presented for the prosecution and defense, nor are you to conclude or assume that, in your deliberations upon these matters, you are confined to the testimony referred to by me. I have merely attempted to classify the general features in such a way that you may be able to apply the law, as I shall give it to you, to the facts as you may find them. It is for you to determine beyond a reasonable doubt, not alone from the testimony I [761] have alluded to, but from any and all parts of the evidence, whether any one or more of such acts as have been referred to was or were, in fact, committed; and, if you should so determine, whether any one or more of them was or were the means conspired to be used to promote, carry out, effect, and execute the object of the conspiracy, as charged in the indictment. For, after all, the real question is not whether these acts were, in fact, committed, but whether these acts, or some of them, was or were the means to be used to carry out the conspiracy. You will observe that it is not necessary, to establish this element of the conspiracy, that you should find that all the means charged were to be used in carrying out its purpose. If you find beyond a reasonable doubt that there was a conspiracy to commit the offense charged, it will be sufficient if you also find beyond a reasonable doubt that one of the acts charged was to be the means for carrying out and executing

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that conspiracy. We have now arrived at a stage of the case where we may properly refer to the law applicable to the conditions which it is claimed prevailed during the occurrences now under consideration. With the merits of the controversy between the railroad company and its employes you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United States. Moreover, it is no defense in this case to say that the railroad company obstructed and retarded the passage of the mails, or entered into a conspiracy in restraint of trade and commerce. If the railroad company violated the law, it should be punished, but we are here now charged with the sole and only duty of determining whether these defendants at the bar have been engaged in a conspiracy as charged in the indictment; and the testimony to which I have referred, bearing upon this question, suggests certain questions of law, to which I will now direct your attention.

The testimony tends to show, as you will remember, that the boycott of the Pullman cars was declared by Debs at Chicago on June 26th, to take effect at noon on that day. It did not, however, take effect at Sacramento until about midnight or early on the morning of the 27th, and its first operation in this district appears to have been to stop train No. 84 at Sacramento, due to leave there at 10:25 in the morning, for Oakland by the way of Tracy. This train, when regularly made up, carries a Pullman car which comes from Chicago to Sacramento on train No. 2. The Pullman car is destined for Los Angeles, and is carried from Sacramento to Lathrop, where it is attached to the train for Los Angeles. The members of the American Railway Union at Sacramento refused to handle this car, by reason of the boycott declared by Debs at Chicago the day before. This train carried the mails. Knox, speaking of this train, says:

"They [meaning the railroad officials] refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be parties to holding the mail. He refused."

He says further:

"That train stood there until leaving time, when it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of [762] the office and turned the plug on the hind end of

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the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks."

A mail train is a train as usually and regularly made up, including, not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such a train, as a mail train, would include the Pullman car as a part of its regular make-up. The obligation which the railway company is under, as a common carrier, to employ such resources as it can command in the transportation of passengers, mails, express, and freight, without unnecessary delay, is one thing. The claim that the employes of a railroad company have the right to say what cars shall constitute a train is quite another thing. It is not for the employes of the railroad company to say whether a Pullman car shall constitute part of a mail train or not.

In the case of *U. S. v. Clark*, in the district court of the United States for the Eastern district of Pennsylvania (23 Int. Rev. Rec. 306, Fed. Cas. No. 14805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. * * * The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go, but the passenger train should not. They uncoupled the mail, and afterwards coupled it, for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads, it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must

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be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars to accompany it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that, while nominally they permit the mail car to go, they really, by preventing the transit of other passenger cars, interfere with the transportation of the mails."

The law as thus declared by two learned judges many years ago is the law to-day. Apply that law to this case as you find the facts to be in relation to train No. 84 at Sacramento on June 27th; and also to train No. 2 at Sacramento on June 29th; and train No. 4 at Sacramento on June 28th, 29th, and July 3d, 4th, and 11th; train No. 69, from Red Bluff to Sacramento, on June 29th, stopped at Broderick; train No. 16, from Portland to San Francisco, stopped [763] at Dunsmuir, June 28th; train No. 15, from San Francisco to Portland, stopped at Red Bluff, July 1st; train No. 42, Santa Rosa to South Vallejo, stopped at South Vallejo, July 12th; train No. 19, from San Francisco to San Jose, July 5th; train No. 13, stopped at Palo Alto, July 6th; train No. 33, known as the "San Ramon Train," stopped at Sixteenth street station, Oakland, July 3d; and train No. 1, known as the "Santa Cruz Narrow-Gauge Train," at Alameda pier, July 4th. I do not understand that the testimony tends to show that there was any mail or express on the three local trains stopped in the vicinity of tower No. 2, West Oakland, on July 4th.

It is contended on behalf of the defense in this case that the boycott declared by the American Railway Union on June 26th, and the strike declared on June 29th, were in themselves lawful. The logical effect of this contention would be that, if any unlawful acts were committed during the pendency of the boycott and strike, they should be separated from these general and admitted acts of the American Railway Union. This feature of the case calls for the most careful consideration of the law as declared by the courts.

In *Thomas v. Railway Co.*, 62 Fed. 803, Judge Taft, in the United States circuit court for the Southern district of Ohio, determined that the boycott of the Pullman cars, as it was enforced in Ohio, was unlawful. The facts in that case were substantially the same as in this case. He said:

"The employes of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render

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their services any more burdensome. They came into no actual relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury upon the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employes had the right to quit their employment, but they had no right to combine to quit their employment, in order thereby to compel their employer to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever upon the character or reward of their services. It is the motive for quitting and the end sought thereby that makes the injury involved unlawful, and the combination by which it is effected an unlawful combination. The distinction between an ordinary, lawful, and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. Boycotts, though unaccompanied by violations or intimidations, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be Minnesota. They are held to be unlawful in England. * * * But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are arteries in the human body, and yet Debs and Phelan and their associates proposed, by inciting all the employes of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employes. The merits of the controversy between Pullman and his employes have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise. More than this, the combination is in the teeth of the act of July 2, 1890, which makes it an offense to restrain interstate commerce." 62 Fed. 821.

In *U. S. v. Elliott*, Id. 801, Judge Thayer, in the United States circuit court for the Eastern district of Missouri, states the law in the following language:

"A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce

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among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Com. v. Hunt*, 4 Metc. (Mass.) 111."

In *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 824, Mr. Justice Harlan of the supreme court of the United States, sitting in the circuit court of appeals for the Seventh circuit, states the law in the following terms:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of its employes would be unlawful which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, and thereby disabling or rendering unfit for use engines, cars, and other property in their hands, or by interfering with their possession, or by actually obstructing their control and management, or by using force, intimidation, threats, or other unlawful methods against the receivers or their agents, or against employes remaining in their service, or by using like methods to cause the employes to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter and attempt to enter the service of those against whom such combinations are specially aimed."

The right of labor to organize for its own benefit and protection, as I have before explained to you, is a substantial right, which the laboring class is entitled to enjoy to the greatest extent consistent with the rights of others. The limitation is that in the exercise of this right the property and rights of others must be respected. It remains for you to apply this law to the facts in the case at bar.

I will now direct your attention to the overt acts charged against these defendants.

OVERT ACTS OF DEFENDANTS.

George Cornwall, an engineer on train No. 13, going down towards San Jose, and No. 6, coming up, on the 6th of July, testified to what occurred at Palo Alto as follows: That he was the engineer on [765] train No. 13 on the 6th day of July last; that they took No. 6's time in coming back. It was express train No. 13, from San Francisco. It went down as far as this side of Santa Cruz crossing. They carried the mail and had a mail car. He saw some mail on

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the train. * * * They stopped at all the main points going along. Left San Francisco at 3:15, he thinks. He returned towards San Francisco. He backed up a train to Lawrence's Station. He ran around it, got on the other end, and pulled it back. Going down, the mail car was on behind; when he was coming back it was in front, next to the engine. He backed up from Lawrence's Station towards Palo Alto station, at the switch there. Reached Palo Alto somewhere about 5 o'clock. It was after 5, pretty near 6, when he got back there. He don't recollect exactly. The mail had not been taken off the train before it reached Palo Alto. At Palo Alto they stopped, uncoupled, and went in on the turntable track. He knows Clark, Rice, Mayne, and Cassidy. * * * He first saw some of them on his engine. This was at Palo Alto. He went in to turn around on the turntable. He got about half way turned around, and was saying something to the brakeman,—he forgets what it was,—when Mayne said: "Never mind those fellows. We will take charge of this engine." Then Mayne began to shake the grates, and was going to open the blow-off cock. He could not get it open until he loosened the nut underneath. He was trying to loosen it with a coal pick. Cornwall told him: "Don't break it off. Take the monkey wrench and unscrew it." Rice gave him the wrench, and told Mayne to go under it, as he knew more about it than he did. Mayne then went under. These men let the water out of the tank; shook the fire down. Mayne tried it, but thinks Rice did most of the shaking. Mayne was on the engine. He said he would take charge of her, and commenced shaking the grates. Cornwall was saying something to the brakeman, and he said: "Never mind them. We will take charge of this engine." Cornwall looked around,—that was the first time he saw them,—and he saw three or four of them there, and seven or eight on the ground; seven or eight all together. He saw Rice, Cassidy, and Mayne. He knows a man named Clark, but is not acquainted with him much. Believes he knows him by sight. Could not swear whether Clark was there with those men or not. The hose was uncoupled. One side was uncoupled by Cassidy; the other side, he could not say. The hose was uncoupled be-

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tween the tank and the engine. The effect of uncoupling that hose was to let the water all out of the tank if the valve was open on top. * * * It is necessary to go under this engine to unscrew the nut. He handed Mayne the wrench, and saw him go under. The turntable was then turned half around. Cornwall wanted them to turn it around, that he might clean the fire out of the ash pan, so that it would not burn the grates. Some one did turn it around, and he ran her over the pit where they put out the ashes. Then the boys went up to the other engine, and, as everything was all quiet down there, he put his coat on, and went up too. He had a talk with Mayne about the mail. He called him to one side and spoke to him. He said: "Mr. Mayne, aren't you [766] afraid you will get into trouble by stopping the mail?" Mayne said: "Damn the mail. You ain't got no mail." Cornwall said: "You have fired on this train long enough to know we do carry the mail all the time." And then Mayne went away, and that is the last Cornwall saw of him to speak to him. * * * There is very seldom a Pullman car on that train. His engine was killed at that time. After these men left his engine, they went up to Mr. Minatt's engine and killed that one. He saw what was going on there. He saw her blowing off, and some one backed her on a split switch in front of the ticket office, and blew the steam right into the ticket office. The back drivers were partly off. It would take five minutes to get her on, if they had another engine there to do it. Could not see who was on the Minatt engine from the time it was moved from its position. There was too much steam. He could not say that these same men were there. Supposes they were. He believes he heard some of them say: "Come on. Let us go up to the other engine." * * * On cross-examination the witness stated that he did not tell those men that they were interfering with the United States mail train when he was on the turntable there, for the reason that there were so many around there he did not think of it. * * * Nothing said, to his knowledge, at the time that engine was killed, with reference to its being a mail train, by either party. It had a mail car on, though, and mail in it going north and south. * * * This conversation that he had

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with Mayne was close by the depot, on the other side of the track. He called him to one side, close by where Minatt's engine was. No one else heard it. Is sure that no one else heard it. That is the only conversation he had with him. Did not have a conversation with him to this effect, in which he said: "Aren't you afraid you will get into trouble about stopping the mail?" Mayne said: "No. I did not know there was any mail on the train, and, if there was, it is pretty late in the day to tell me." * * * Thinks there were more than four there. About seven or eight. Somewhere in that neighborhood. He had one brakeman and a fireman. He thinks he was helping turn around. He did not offer any resistance to them. They came on him so quickly that he did not think about much of anything.

W. R. Sowers testified that he was a brakeman in the employ of the Southern Pacific Company. That he was such on the 6th of July last. That he was on Conductor Gould's train as brakeman. Saw what happened to the engine of that train run by Cornwall. When they came into Palo Alto, coming back as No. 6, he cut the engine off from the train and took it over to the turntable, and started to turn it. He had the engine half or a third turned around, when there were five or six different parties came from over the field,—five or six different men. They were all together, as close as they could be, coming towards the engine. They came over and proceeded to kill the engine. One of the gentlemen in the crowd spoke to him and said: "You don't need to turn it any further. You remain in Palo Alto over to-night. You have run far enough to-day." Does not know who that man was. He was a tall gentleman, with a black mustache. He would know any of the gentlemen that were [767] with them at that time by sight, but not by name. (The defendants Mayne and Cassidy being directed to stand up, the witness identified them both.) After one of these men told him that he need not turn the engine further, but that he could remain in Palo Alto, the light-headed gentleman (Mr. Cassidy), who was on the left-hand side of the engine, and had something in the way of a hammer or monkey wrench, assisted to uncouple the hose between the tender and engine. He could not see who was on the other side. Did not notice who was

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in the cab. Mr. Mayne was in the cab, but what he was doing the witness does not know. He could not see unless he got into the cab. There were a couple of others in the cab at that time. Nothing else occurred, that he knows of, outside of uncoupling the hose between the tender and the engine, letting the water out, and blowing the steam off. Saw the steam escaping. Water escaped from the boiler. That engine was killed at that time. The fire was shook down. He supposes it was all out. * * * Mr. Mulder was in the cab before these men reached the cab. Mulder was helping to turn the engine. Mulder was on the opposite side from where he was. After they killed the engine, these men went from his engine over to Palo Alto station. * * * They were going at a moderate little trot. They were not running very fast, or anything like that. * * * Is acquainted with the signals that are used on passenger trains. This was a regular train.

Peter Mulder was fireman on the engine of which Cornwall was engineer. He was present when Cornwall's engine was killed, but he is unable to identify the defendants as being the persons who assisted in killing the engine. The material parts of his testimony are as follows: Having returned as far as Palo Alto, they stopped the train, uncoupled, backed it on the turntable, to turn the engine around, because she was headed the other way, and they were going to San Francisco. As soon as the engine stopped on the turntable, he got off the engine, to help push the engine around. * * * He was alone on the back end. He don't know whether any more were on the forward end with Long, or not. The engine was between them. Just as he put his shoulder to the lever to push it around, he saw some men coming from the back end of the engine towards the engine. They were walking pretty fast. Some were running a few steps. Some of them went up on the engineer's side of the engine; some of them stayed behind the engine. One of them turned open the air pipe under the engine while he was pushing around. He looked round and saw the air was blowing out of the hose. He stepped up and shut it off. Some one says, "God damn, leave that alone." With that this person opened it again, and Mulder went up on the engine. They pushed the engine

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partly around a little ways. Mulder got up on his seat, and sat down to see what was going on. Cornwall, the engineer, at the time he (Mulder) got up, was sitting on the seat box. * * * The engine was killed. Saw the squirt hose used. One of the men said to him, "Turn that squirt hose on." Mulder said, "No, I will have nothing to do with this," and with that he reached by him and turned it on himself. They opened the door of the fire box, and squirted the water over [768] the fire, and killed it. They had already shaken the grates a little, although the fire was not altogether shaken down. This person was trying with a pick to open the blow-off cock, and the engineer told him it could not be opened that way; he would have to take a wrench and go underneath and loosen the nut before he could turn it. The engineer handed him a monkey wrench. One of the men went underneath and loosened the nut, and they blew the water out of the boiler and out of the tank. There were engaged in that work at least six, if not seven. He thinks there were seven,—three behind the tank when he left there, and four in the cab when he got up there.

T. J. Long was also a brakeman on the train pulled by Cornwall's engine. He accompanied the engine to the turntable, to assist in turning it around. He saw the killing of the engine, but is unable, like Fireman Mulder, to identify the defendants, or to distinguish the part they took in the disabling of the engine. He noticed some of the men coming down in the train with him. He recognizes Cassidy as being a member of that party. Cannot say as to Mayne, nor as to Rice and Clark.

C. B. Gould was the conductor of the train whose engine, of which Cornwall was engineer, was killed. He states that he left San Francisco on July 6, 1894, at 3:05, on train No. 13. The time was 2:20, but they waited for troops to take to San Jose. It was a mail train, having a mail car. He had baggage and express and mail, smoker, and, he thinks, two or three coaches. He had no Pullman cars,—no Pullman sleepers. He went as far as Santa Clara crossing, left the troops there, and returned immediately as No. 6; that is, on train No. 6's time. Those were his orders. It was a mail train returning. Left Santa Clara crossing at 5:15 p. m.

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Reached Palo Alto at 5:55. The engine had been backed all the way from Santa Clara crossing, there being no turntable between that place and Palo Alto. Arrived at Palo Alto, he left the train on the south switch. The engine was sent on to the turntable, to turn her, so that the pilot and engine would come first. He told his men to go up with the engineer and fireman and turn the engine, while he went to the depot to get orders, if there were any to obtain. It was his intention to take that train right through to the city. Did not intend to stay at Palo Alto more than about 10 minutes. It would have taken them only a couple of minutes had they not turned the engine. He had just arrived at the ticket office when some one sang out to him, "I saw some one running towards your engine." He ran to the engine from the ticket office. When he reached her she was virtually dead. Saw Rice, Clark, Cassidy, and Mayne around the engine when he reached it. Rice was shaking the grate. The hose of the engine was cut; that is, it was uncoupled. That is the hose between the tender and the engine. Did not see who cut it. While examining the engine, he noticed Cassidy, Mayne, and others make a run for the other engine, of which Engineer Minatt was in charge. She had just arrived with a train from San Francisco. He followed them up. When he arrived, it also had been killed. With the exception of seeing Rice [769] shaking the grate, he did not see any of the acts connected with the killing of the two engines. In answer to the question, "Did you have any conversation with Mr. Rice and Mr. Clark in respect to this act?" the witness stated:

"After this was over I went to the telegraph office and notified the superintendent what had been done. Shortly after, I passed down track to go to my train, which was on the main track below, to protect it, and I met Mr. Rice and Mr. Clark coming towards the ticket office. I said to Mr. Rice and Mr. Clark: 'Well, you have tied us up.' He said: 'Yes. Well?' I said: 'This is a very wrong, unlawful act, and you have no grievances whatever against the Southern Pacific company, or any other company;' that is, speaking of them as the A. R. U.'s. I says: 'It was only to make the railroad companies whip Pullman, or, in other words, bring him to their terms.' He stated: 'We had orders to do this, and we have done it.'"

Rice, Clark, Mayne, and Cassidy remained around Palo

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Alto about 20 or 30 minutes. Possibly it might have been more. There were no other engines at Palo Alto save those two. They laid there until the next morning, until they got another engine to pull these engines to Menlo Park, and filled them with water and got up steam, so that they were able to make the trip out. Got back to San Francisco about half past 10 or 11 o'clock the next morning. Were due in San Francisco the night before.

Edward J. Kincaid, assistant agent at Palo Alto, called for the United States, testified that his attention was attracted to Cornwall's engine by hearing some one holler, "They have got it." He was then in the ticket office, and ran out, and saw four or five men coming from the field between the county road and the railroad track. He saw the men climb over the fence and climb up on the engine. The engine was half turned around on the turntable, and he did not see what they were doing to her, but he states that steam soon began to issue from the boiler, and the engine was turned clear around and run onto a side track, and there the steam was blown off. This crowd remained around the engine probably about six or seven minutes. They then went to Minatt's engine, and climbed up on the engine and told them to get out,—told the fireman to get out. They then let the steam and water out of the engine. Knows Rice, Clark, and Cassidy by sight. Does not know the others. He saw them there at the time these two engines were killed. Saw them mingling with the crowd. The only one he saw on the engine, to recognize, was Rice. Did not see either Clark or Cassidy on the engine. But they could have been on the engine, and still he might not have seen them. Could not see what they were doing. On redirect examination he states that he could see that the hose between the engine and tender was uncoupled, hanging down, and he could see under this hose where the water had run out.

Robert Dannenburg, station agent at Palo Alto, also agent for Wells, Fargo & Co., and Western Union operator, called for the prosecution, testified that he saw some five or six men coming from the county road towards the railroad track east, at a sort of dog trot; that they went to Cornwall's engine; that he saw them stop the turntable when

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about half way around, but he could not dis- [770] tinguish who it was that stopped the turntable. He saw steam escaping from the engine, and shortly after they (the crowd) turned the engine clean around, and ran over the ash pit. Ran her off the turntable, right onto the track. He could not see any particular thing that was done on the engine from where he was. The crowd then went over to Minatt's engine. He saw Rice board that engine, and also another man. All that he saw with reference to Minatt's engine was two or three men climbing the engine. He did not see the rest of it. But, probably two or three minutes after these men boarded the engine, he saw steam blowing off from the engine. Saw Cassidy, Mayne, Clark, and Rice in the neighborhood of those engines at these times. Distinguished them near Minatt's engine, but could not see what they were doing.

E. F. Minatt, called for the United States, testified that he was an engineer on the Southern Pacific system, running on the Coast Division; that he was an engineer on or about the 6th of July last. He went off on No. 17 according to the time card, which leaves San Francisco at 4:25 in the afternoon, but he thinks they were 10 minutes late on that day. Pulled a local train between San Francisco and Palo Alto. He reached Palo Alto that day. He was to return from Palo Alto the next morning at 6:40. Four of the boys,—two of them fired for him before, and he pulled the other two as brakemen (Cassidy and Mayne, they both fired for him, and a fellow named Rice, a brakeman, and Clark),—they came to his engine. He was down on the ground and they got up. He thinks Rice—he is not sure—commenced to shake the fire out of the grates down into the ash pan. Cassidy and Mayne commenced to uncouple the hose. They wanted to blow the water out of the boiler, and let it out of the tender. At this time Rice came around, and the witness said to him, "Boys, don't damage the engine." They said they would not; only let the water out of the boiler and tender; and they did that. There was such a crowd around there that he could not tell how many there were. Cassidy, Mayne, Rice, and Clark were actively taking part and killing the engine. Mr. Cassidy, he thinks, and Mr. Mayne, both had a hand in loosening the blow-off cock. The witness gave them a

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wrench to do it,—to unloosen the blow-off cock,—and they did it. After they had blown the water partly out of the boiler,—the water was about out of the tender,—the young man Clark got up and backed her out through an open switch. Witness hollered to him, and told him the switch was wrong. He got the tender out and the back drivers out over this switch, then he undertook to run her ahead on the main track, and derailed her. She stood there like that until they sent a man from San Francisco to pull her on. * * * There were some exclamations made of "Hip, hip, hurrah for the A. R. U." There was such a crowd around there—such a jam—that he could not get to the engine from the crowd. Who it was did it he don't know. The only man that he saw at the time of the hurrahing was Clark. The latter was on the engine after he derailed her. He did not see Mayne or Cassidy or Rice at the time the hip, hip, hurrahing was going on. After the excitement [771] was over, he saw the parties going towards Menlo Park. He saw Mayne, Cassidy, Rice, and Clark going towards Menlo Park.

Edward C. Murray, a witness for the United States, testified that he was the railway postal clerk who accompanied train No. 13, coming back on the same train,—it coming back as No. 6; that is, on No. 6's time. He testifies as to its being a mail train. He did not see the engine killed. He testifies as follows:

"Q. State what mail, if you recollect, you took up or delivered on the way down, or coming back. A. I received mail from all stations between San Francisco and Lawrence, inclusive. Coming back, I received mail from Lawrence, Mountain View, and Mayfield. Q. Did you have a mail car, or not, on that train? A. Yes, sir. Q. Did you reach Palo Alto? A. Yes, sir. Q. Did you go beyond Palo Alto that day. A. Not that night; no, sir. * * * Q. What time were you due at San Francisco with that mail? A. 6:26."

AS TO CONVERSATIONS HAD WITH CLARK.

R. M. Donne states that he was a conductor on the Coast Division, and that he was at San Mateo on the evening of the 6th of July, and the morning of the 7th. He saw Cassidy, Rice, and Clark there that night (the 6th). Also saw a gentleman with them who weighed about 180 pounds; had a smooth face; was heavy set. He had a talk with Clark that night. He spoke to him outside of the ticket

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office, and asked him if he would come inside of the office with him (Donne), and that he would introduce him to their assistant general passenger agent, and several others. He acceded, and came in. F. S. Douty, the secretary of the Pacific Improvement Company; H. R. Judah, the assistant general passenger agent; L. H. Fuller, an employé in the ticket auditor's department; the station agent, Mr. Peckham; and his assistant, Mr. Elmes,—were present. He testifies as to the conversation as follows:

"I introduced Mr. Clark to these men, and he was asked by Mr. Douty why they wanted to tie up the Coast Division. Well, he said that the boys on the other side were complaining that they were not taking any part in this affair; that they had the other side tied up, also the Narrow Gauge, and they had to do something on this side. Q. Do you recollect anything further that was said at that time? A. Nothing more, except that he was asked whether they had any grievances against the Coast Division. He replied by saying, 'No; not particularly.'"

F. S. Douty, a witness on the part of the government, narrates the conversation that passed between himself and Clark as follows:

"I think the conversation with Mr. Clark, after the introductions were over, by asking his reasons for this strike,—to get some information. He said that the Pullman Company had not treated the boys right, so that they had to strike on any road where Pullmans were used. I suggested that no Pullmans were used on this division. He said, in effect: 'No; but the boys on the other side' (referring to the Oakland side) 'are kicking, thinking that we are not doing enough here; so we have to keep our end up.' I said, 'Why do you have to keep your end up?' 'Well, we belong to an organization where we have taken an oath to stand together.' And he added, 'If we don't win this fight, I will go to China.' I said, 'Have you got any complaint to make against this Coast Division?' He said, 'No; there is no kick coming.' I asked him if it was what he called a 'sympathetic strike'; if he was striking in sympathy. He said, 'Yes,' he thought that was substantially it, so far as the Coast Division was concerned. I am giving the essence of my recollections, without trying to repeat the language."

[772] Upon being asked if he could give the names of any other person with Clark, he says one was called Cassidy; another, Rice.

H. R. Judah, who was present at the conversation carried on between Mr. Douty and Mr. Clark, thus gives his version of it:

"Mr. Douty took the leading part in opening the conversation, and in a general, pleasant way, asked Mr. Clark what was the object of their tying up the Coast Division. * * * I cannot give the exact language, but, according to my recollection, Mr. Clark replied that the

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men on the other side (having reference to the Oakland side) had complained that nothing had been done on the Coast Division in the way of tying up trains, and that they felt it necessary to do something (or words to that effect). Then Mr. Douty asked him—I think that was the next question that was asked—why the Coast Division should be singled out, you might say, entirely disconnected with the balance of the system, in so far as Pullman cars were concerned. Mr. Clark replied, in substance, that that did not cut any figure in the matter at that time; that they were into this fight, and that they were going to stay with it; and, furthermore, said that if they lost their cause he was going to China,—he would not live in this country. The conversation was carried on by all of us. Questions would be asked, but I cannot recall every single question that was asked, or every answer that was given. In substance, it is the same as Mr. Douty has given, and Mr. Peckham. My memory might be refreshed if some questions were asked of me, but, in the main, what I have said covers the ground. Of course, a good deal was said to Mr. Clark, to try and persuade him to have the men cease on the Coast Division; to allow that to be an exception, as there did not exist, in fact, any cause for complaint on the part of those employed on the division, and if they continued in blocking the traffic it must be on the ground of sympathy, and nothing else. Then Mr. Clark reiterated—in fact, he reiterated on two or three occasions—the fact that they were in this fight, and they proposed to see it through.”

The witnesses Peckham and Elmes testify substantially to the conversation between Clark and Douty as detailed above.

On page 644, vol. 8, of the testimony, appears the following admission:

“Mr. Monteith: We will admit that both of these defendants are members of lodge No. 345 of the American Railway Union, located in San Francisco. Mr. Knight: Q. In the latter part of June? Mr. Monteith: In all of June, and all of July last. Mr. Foote: Let that be taken down. Mr. Monteith: We will admit anything of that kind. We have nothing to conceal about it. Our side of the case is an open book.”

TESTIMONY ON BEHALF OF DEFENDANTS.

The defendant John Mayne testified: That he was a locomotive fireman on the Coast Division last spring. That he was hostler at San Francisco at the time of the strike. He had charge of the engines after they came in off the road, put the necessary supplies on, put the engines in the house, and got other engines out to go out on the road. Had been employed on the railroad about six years. Understands all the duties of a fireman. Was familiar with the rules of the company at the time of the strike. Belonged to the Brotherhood of Locomotive Engineers and the American Railway Union. That he attended meetings of the A. R. U.

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in the last part of June. He belonged to the San Francisco lodge. He attended a meeting on the night of the 29th of June. The lodge met on Mission street, between Fifth and Sixth. After the admission of members there was a message read stating that the members of the local union 310, in Oakland, had declared a strike on account of the discharge of [773] men. He identifies Exhibit No. 296 as the message, as near as he could remember. It reads as follows:

"June 2, 1894, Oakland, Calif. To J. E. Riordan, 118 Sixth St., Room 71, S. F.: American Railway Union three hundred ten has declared strike takes effect twelve thirty a. m. to-day. T. J. Roberts, President."

He further states that he thoroughly understood the cause of the strike. His union never participated in the boycott against the Pullman cars. With regard to the strike at Oakland, a motion was made, and a standing vote taken, that they indorse the action of the Oakland Union in striking, and that a strike be declared by their lodge for the reinstatement of the discharged employés. So far as this lodge was concerned, there was no other purpose in striking than the reinstatement of these men. After the strike was declared, the next action of the meeting was the appointment of an executive committee. Harry Bederman, George Elliott, Pete Farrel, and W. S. Runyon were appointed on that committee. They had full power to manage the strike, and all the business connected with it. The union did not reserve any authority to itself. After the appointment and authorization of this committee, the next business transacted was a discussion in regard to handling the mail. This was on the night the strike was ordered. The meeting of the 29th, some one made a motion (he thinks, Mr. Achorn) that the lodge take a vote as to whether they were willing to handle the mail or not. A standing vote was taken. Everybody in the hall stood up, in favor of handling the mails at all times. He did not hear any reference to interstate commerce. After that they held a meeting every day,—sometimes twice a day. He thinks he attended all meetings up to the afternoon of the 6th. Does not remember anything that was done, except routine business connected with the admission of new members, and so forth. He was in San

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Francisco on the 5th of July. Saw Cassidy every day. Has known him about six years. For the last three years he has been almost a constant companion of Cassidy. They roomed together, boarded together, and were together evenings, and all the time. Saw him on the 5th. On the morning of July 5th, Cassidy and he, after breakfast, attended a meeting of the union. After the meeting they went around town,—he does not know just where, now; and in the afternoon they went to Valencia street, and took the train bound south,—bound for San José. He invited Cassidy to go down with him to San José, to see his folks, on the morning of the 6th. He had been with him all the morning from the time they got up. He asked the agent if there would be a train along in the afternoon. The latter informed him there would. He asked him for two tickets to San José. He notified him they were only carrying passengers as far as Mayfield. He bought two tickets for Mayfield, and handed one to Cassidy. He thinks it was about 3:30 o'clock when he got on the train. It was an ordinary train. There was a mail car on the hind end of it. Next to the mail car there was a car load of passengers. He tried to get into the car, and did not know what was in it, and the brakeman refused him admission. He then took the car immediately ahead of that. Cassidy did not get in at the same time he did. He saw Clark and Rice on that day. [774] When he got on at Valencia street, he was reading a newspaper. When he finished with the paper, he went into the smoking car. When he arrived there, there were quite a few people in the smoking car. There he saw Rice and Clark, and he believes Cassidy was in the smoker at the time. Rice and Clark and a number of passengers were talking to a captain of the militia,—he supposes it was a captain; he had stripes on his uniform. Just before they got to Redwood, the captain left the car, and went back through the train. Fred Clark came and sat down alongside of him. They chatted along the way. Mayne asked him where he was going. He said he intended to go to San José, but he only had a ticket for Mayfield. When they got to Mayfield he and Cassidy got off, and Rice and Clark also, and a great number of the other passengers. The first thing they did was to look for a conveyance. He

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found nothing there; no wagons around the depot. They talked the matter over, and finally concluded to go back to Palo Alto. There are a couple of crews which run in there, and they thought they could get definite information of whether train 19 was coming out that afternoon or not. If there was no way of getting to San José they would have come back to the city. They walked up the county road very leisurely. Stopped just outside of Mayfield, and looked at the cavalry. There was a company of cavalry camping just outside of Mayfield. Walked up the county road to almost opposite Palo Alto. Cassidy complained that his shoes were hurting him, and wanted them to wait a moment. They jumped over the fence; sat down under a tree in University Park. They stayed there 10 or 15 minutes. While they were sitting there an engine came in on the turntable. They all got up and looked at it. He does not know whether he suggested that they go and kill it, or whether Rice did. He knows that Rice and he got over the fence, and went over and killed the engine. Rice and he were in advance of the rest. He did not know whether the rest were coming or not. He did not look around to see. They got to the engine first. He went up on the left-hand side, over the timber of the turntable, and thinks Rice went on the right-hand side. When he got on the engine, Engineer Cornwall was standing up with his head out of the window. There was a fireman, a man with overalls, and a man in citizen's clothes, turning the turntable. Cornwall was saying: "A little ahead. How is that, pard? A little ahead,"—repeating that remark two or three times. He (Mayne) said to him, "That is all right, George; she is all right where she is." Cornwall said. "What are you going to do?" Mayne replied, "Nothing in particular." Cornwall then stated, "Don't hurt my engine, boys." To which Mayne replied, "We have no intention of hurting your engine." That was all that was said. He caught hold of the grates, and started to shake the fire out. He tried to shake the fire out. It was in such a condition—it was all clinkered—that it would not go through the grates. He was about to give it up, when the idea struck him that he could put it out with a squirt on the left-hand injector. He put on the injector, turned the water into the

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fire box, and drowned the fire out. * * * About the time he thought the fire was quenched, he asked the engineer if he thought [775] it would be safe to let the water out. The latter stooped down, looked into the fire box, and said he thought it was all right. Then Mayne took the coal pick, and tried the blow-off cock. He suggested to the engineer that they had better run the engine off the turntable, on account of the blow-off pipe coming against the timber of the turntable, and it would scald the paint on the engine. He approved of that, and the table was turned back for the straight track, and the engineer ran the engine off over the ash pit. Mayne tried the blow-off cock, and he could not open it. The engineer told him he would have to get down underneath with a monkey wrench, and loosen up the nut in the bottom of the car. Cornwall gave him the monkey wrench. Mayne jumped down on the ground. It was necessary for him to get under the engine, so he took off his hat and coat, and handed it to the engineer. The latter held his hat and coat while he opened it, and until he got back on the engine. * * * There was nothing said, further than what he has stated. The engineer requested them not to hurt his engine. He said: "Boys, don't hurt my engine. I like my engine." And he repeated that remark two or three times, and that was all that was said. * * * Just before he finished killing the engine, Rice came back from up towards the depot, and after he let about four inches of water out of her he went back into the cab, and opened the blow-off cock. Then he stood by the water glass, and watched it until the water went out of sight in the glass. Then he closed the blow-off cock. He did not know but what the fire might kindle up again, and he was not taking any chances on it. He shut the blow-off cock as soon as the water went out of sight. After they killed the engine, Rice and he walked up to the depot. There was a crowd of 20 people up there, he supposes. Just before they reached the depot, the other engine that Minatt was running was blowing out against the side of the station-house,—a little station, six by six. He said to him (Rice): "That won't do. You don't want to spoil the paper in there." He mentioned the paper and instruments. Rice went up on one side, and he

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on the other. They moved the engine ahead a foot, so that she would clear the building. Rice was moving the engine, and he had hold of the brake wheel. About the time they moved a foot, some one hollered, "Whoop! you are off the track." They stopped immediately. The water was all, or nearly all, out. He kicked the blow-off cock shut, and got down off the engine. He had nothing whatever to do with the killing of Minatt's engine. He got up there. The fire was all out, and the water almost all out. He had a talk with Engineer Cornwall just before they left Palo Alto. Cornwall was up at the station. Cornwall called him over, and said to him: "Pard, don't you think you have done something pretty serious, in stopping the mail?" Mayne replied: "No, I don't think so. Even so, this is a hell of a time to tell us of it now, when it is all over." Mayne then turned round and walked off. He denies having made the statement testified to by Cornwall, as follows: "I says, 'Mr. Mayne, aren't you afraid you will get into trouble by stopping the mail?' He [Mayne] said, 'Damn the mail. You ain't got no mail.'" Cornwall replied, "You have fired on this train long enough to know [776] we do carry the mail all the time." He, on the contrary, affirms that statement was just exactly as he gave it, word for word. He further states that he had no knowledge of any mail train coming along at that time, and before he killed the engine; did not know that a mail train was due at that time on the schedule. Is familiar with the surroundings at Palo Alto. The train could not be seen from that turntable. He remained in Palo Alto about 40 minutes; then went over to Menlo Park. Cassidy told him he had heard that Haydock had telegraphed to the constable at Palo Alto to arrest them. The first thing they thought of was to move over to Menlo Park. They stayed in Menlo Park an hour, or may be an hour and a half. Ate supper over at the hotel. Then they tried to get a rig. The livery stable man wanted too much. He suggested to the boys that they walk over to Redwood; there was a friend of theirs over there who would drive them up. They walked to Redwood, got a rig there, and they were taken as far as San Mateo. Got to San Mateo between half past 10 and 11 o'clock. Did not do anything in particular.

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only sat on the platform and talked with the boys around there. On cross-examination the defendant Mayne testified that he bought his ticket as far as he could go in the direction of going home,—to San José. The distance from Mayfield to San José is 16 miles. He was there when the train left. He made no effort to get on and buy a ticket from the conductor, and proceed on his journey, when he saw it going further on, although his destination was his home, at San José. He did not think they were carrying passengers any further than Mayfield. He supposed he would find the regular Palo Alto crews at Palo Alto. He knew that two trains laid over at Palo Alto at night. From where he was, he could not see the train coming back. He did not hear it coming. He was over 200 yards from the road. He admits that, although he neither heard nor saw the train come in, he suddenly started over to kill a live engine. He had fired on that train. He knew that Cornwall sometimes went on that engine. He knows all the engineers on the Coast Division. He states that he did not know what engine was on the train that he went up on, but he admits that he knew train 6 was due at San Francisco at 6:30. Being asked to repeat the circumstances under which he jumped up and ran for that engine, he states that when the engine came over the switch, just before she came on the turntable the cylinder cocks were opened, and made a lot of noise,—steam blowing off. They got up and looked at the engine. He don't know now whether he suggested to Rice, or the latter suggested to him, "Let's go and kill her." They did not debate the question at all. They went and killed her.

"Q. What was your purpose in killing a live engine there? A. I have not any good reason for killing the engine. We wanted to be doing something, I suppose. We wanted a frolic. Q. Did you not know that a live engine could pull a train? A. I did. Q. And a dead one could not? A. And a dead one could not. Q. Did you not kill that engine because you did not want it to pull a train? A. I did not know one was there at the time. Q. Did you not know that a live engine usually pulls a train? A. Yes, sir. Q. Did you not know that to kill that live engine was to disable it from pulling a train. A. I did. Q. Yet you killed it, and for no purpose? A. I did not know there was a train there, attached to it. I thought it was a light engine. It is customary— Q. I do not want anything about customary. I want you to answer my question. Now, Mr. Mayne, did you not know that to kill that live engine would render it impossible to take a train that might be there back to San Francisco? A. I did not think anything about it. Q. You just went

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up there out of pure deviltry? A. Yes, sir. Q. You did not know whether there was a train or not, or whether or not there was any mail, or not any mail, and you killed it out of pure deviltry? A. I did not debate it. I thought it was a light engine, and went over there and killed her for no reason whatever. Q. Did you not do it for that reason? A. For deviltry? Q. Yes; from a pure spirit of mischief and deviltry. A. I guess you might as well put it that way. Q. Without caring what the result was? A. That is as good an answer as any."

Referring to the conversation he had with Cornwall about the mail, he states that, if he had stopped the mail, it was too late to start it then. The engine was killed. He made no effort whatever to repair that which he was told was a violation of the law. He left because he did not know just exactly what the consequences would be. He went off towards San Francisco. He went in company with these men,—Clark, Cassidy, and Rice.

John Cassidy, the other defendant on trial, testifies, substantially, that he was a fireman employed by the Southern Pacific Company last spring; that he had been such for about eight years; that he belongs to the Brotherhood of Locomotive Firemen, and San Francisco Lodge, No. 345, of the American Railway Union; that he attended the meeting of that union on June 29th; that "every one was there, and there was a telegram read about the Oakland strike, or about the Oakland boys going out on a strike, and we indorsed their action. * * * We all decided to strike." He states that most of the members of his union were employed on the Coast Division; that at that meeting, besides ordering a strike, they took in a number of new members, and appointed a crew to go down, and go out with the mail the next morning. They also appointed a mediation committee. The witness' statement as to the invitation tendered him by Mayne to go down to San José on July 6th, to visit Mayne's folks, agrees substantially with the latter's testimony. The witness further states that he first saw Rice and Clark on July 6th, somewhere between San Mateo and Redwood City, on the train. He got off the train at Mayfield. He states that, after an ineffectual attempt to secure a conveyance to San José—

"We concluded to go back to Palo Alto. We went back to Palo Alto to see if train 19 was coming through. When we got up about opposite Palo Alto, on the way up, there was some cavalry marching

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back from Santa Cruz; some regular troops. They were in the field. We stopped and talked with them for quite a while. We walked on until we got opposite Palo Alto. I had a new pair of shoes on. I told the fellows they could go on the rest of the way, if they wanted, but I was going to take my shoes off. I climbed over a fence in the park, took off my shoes, and laid down in the grass. They all got over the fence, too. We were sitting there, or laying there, telling stories and yarns, for about ten or fifteen minutes, when we heard the cylinder cock of an engine blowing off. Some of the boys got up, and looked over the fence, and saw an engine. Some one says, 'There is an engine on the turntable,' and they started for it. I had to put my shoes on, and, I believe, my coat. Somebody else had their coat off. They were on the engine before I got there. I got there just as quick as I could, after I got my shoes and coat on. There were two or three in the cab of the engine. I went around to the left, and started to take off or uncouple the tank hose. [778] I turned around, and happened to see Minatt's engine up the track, and I quit my job, and went up to Minatt's engine. Q. What did you do with Minatt's engine? A. Between Minatt and myself, we loosened the blow-off cock, and blew the water out. The fire was already out of it. I had to crawl under the engine to do it. The tank valve was open, and the water was running out of the tank. Q. Did Minatt offer any resistance? A. No; he stood off, and seemed tickled. He gave me a wrench to do it; told me where I could get one. I had to lay down flat. There is an air drum under the deck, and I had to lay down flat, and crawl under it. Q. Was Mayne there when you were killing that engine? A. No, sir. Q. Who was there besides Minatt and yourself? A. I think Clark and I did that job. I am pretty sure Clark was there."

Upon being asked by his counsel if he knew what the indictment charged, he states that he does, but that he never did anything except to let water out of that engine. Respecting the cause of his leaving Palo Alto that night, he states that somebody in the crowd told him that the division superintendent, Haydock, had ordered the constable at Palo Alto to arrest them; that they thereupon went over the county line to Menlo Park, and subsequently to San Mateo. On cross-examination, being interrogated as to his motive in running towards Cornwall's engine to assist in killing her, he states that he went because the others did; that he helped kill the engine because the rest of them were killing it; that he simply wanted to be with the crowd, or, to use his own language, "I suppose I wanted to be in the swim." Respecting the killing of Minatt's engine, he states that he thinks he was the first man to reach it; that when he did he got up and looked into the fire box; the fire was out of her; he started in to open the blow-off cock; that the effect of this was to let the water out; that he let nearly all of the water out; that the effect of this was to kill the engine. He also states that, while engaged in killing Minatt's engine, he heard some one

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holler, "Three cheers for the A. R. U." Being asked to give his reason for killing Minatt's engine, he states that it was "to have a good time." He states that he would have done what he could towards killing Cornwall's engine if the other engine (Minatt's) had not been there. Further, that he did not think of any consequences that might ensue, from the killing of those engines, to him; that the only reason that prompted him to kill those engines was "to keep my hand in."

F. W. Clark, one of the defendants in the indictment, but not on trial, was called for the defendants, and testified, briefly, that he was a brakeman on the Coast Division of the Southern Pacific Company, and had been such for about two years; that he was braking between San Francisco and Monterey, on the freight trains; that he knows Rice; that he met him on the morning of the 6th of July at the A. R. U. meeting; that, after the meeting adjourned, Rice asked him to go down to San José with him; that they could not get tickets for San José, and they went as far as Mayfield. On cross-examination he states that he met Cassidy and Mayne on the train between San Mateo and Redwood City; that he stayed with them all the while until they got back to San Mateo; and that he finally came to San Francisco with them. He states that, when they got opposite University Park, Cassidy complained that his shoes were hurting him. They thereupon climbed over the fence [779] of the park, and sat down under the shade of a tree. After they had been sitting there about 10 minutes, he heard a noise of steam blowing out of a cylinder cock of an engine. He rose up, and looked over, and saw an engine going on to the turntable. Either Mayne or Rice said: "There is an engine. Let's kill her." They jumped over the fence. He followed them over to the engine. When he reached there, Mayne got up on the engine,—on the left side,—and Rice on the right side. He got up behind Rice. Cornwall was standing by his lever. He had his head inside the cab when he (Clark) first got up. Then he stuck his head out, and said to some one in front of the engine: "What do you want? A little more ahead. Is she all right, pard?" He believes it was Mayne who replied, "She is all right where she is, George." Cassidy was some distance behind. The witness stayed on Cornwall's engine

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about a couple of minutes, and then went over to Minatt's engine. Cassidy also went over. Rice got on the engine, and Cassidy did also. The witness got up behind Cassidy. There was no fire in the fire box; the witness took out a hammer from the tool box on the tank, and disconnected the hose, and took the packing off, and pulled the strainer out, and put the hook and hammer and strainer back in the box. Respecting the conversation he had with Douty, Judah, Donne, and others in the station at San Mateo, he testifies that he was called by Conductor Donne, who said to him: "There is some people in here who want to have a talk with you." He asked: "Who are they?" Donne said: "Douty and Judah. They want to talk with you about the strike. This is no put-up job to put you in a hole, or anything like that." He states that he went in, and was introduced to Douty and Judah. He believes it was Douty who asked them what they had struck for. He told them members of the Oakland Union had been discharged for refusing to handle Pullman cars, and that the union over there had ordered a strike, and Union 345, in San Francisco,—the union he was a member of,—indorsed the action of Union 310, and they struck. Douty said: "What do you want to strike on the Coast Division for? They are not hauling any Pullman cars here." And he wanted him (Clark) to go back to San Francisco, and declare the strike off. Clark told him (Douty) that he could not declare the strike off. Respecting his motive in participating in the killing of the engines, the testimony is as follows:

"Q. (on cross-examination). What was your idea in killing these engines, where there were no Pullmans running on that end of the line, unless it was to help out those that were striking against the Pullmans? A. I do not know. I was with the others, and helped them. Q. You were with the others, and helping them? A. Yes, sir. Q. And you had no idea in the world as to what the object was? A. No, sir."

This concludes the review of the testimony relating to the overt acts charged as having been committed by the defendants at Palo Alto. It is for you to say whether it establishes, to your satisfaction and beyond a reasonable doubt, that the defendants committed any of the following acts charged in the indictment, to wit:

"(1) Forcibly taking possession and control of the * * * engines * * * of the Southern Pacific Company, by (1) * * *

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(2) threats, intimidations, [780] personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employés of said company having charge of said * * * engines, etc.

"(2) By forcibly and violently preventing the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto, by (1) gathering in crowds, etc.; (2) by placing physical obstructions upon said track; (3) by displacing the switches; (4) by forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employés while engaged as aforesaid; (5) by uncoupling the cars of said trains, and disconnecting the same; (6) by removing said cars from said tracks; (7) by withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein [I call your particular attention to this charge, and the evidence relating to the overt acts under this head]; (8) by displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails; (9) by other violent, forcible, and unlawful acts and means, to the grand jurors unknown."

As I have before explained to you, it is not necessary that the government should prove that all the overt acts charged were committed by the defendants. If you are satisfied, beyond a reasonable doubt, that they committed any one of the acts charged, it will be sufficient, in determining this element of the offense involved in the crime of conspiracy.

Whether the Southern Pacific Company was in June and July last a railway corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, and express matter, in this district, and over the lines of the railways mentioned in the indictment, is a material fact in the case, which you will be required to find, as you would any other material fact; that is to say, beyond a reasonable doubt. You will recall the testimony of Mr. Lansing upon this point, and the circumstance that no testimony was offered to contradict him in any particular.

Whether train No. 6, at Palo Alto, on July 6th, was a regular or special train, is immaterial. The testimony tends to show that the train carried the mail, and that it was being carried over post route No. 176002. Whether some other train was annulled or not is also immaterial. The question is, was this train carrying the mail under the sanction of the postal authorities? If it was, it was a mail train, in the eye of the law.

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It is claimed by counsel for the defendants that an intent to obstruct and retard the passage of the mails cannot be inferred against these defendants unless they had knowledge that the mails were on board the train when they killed the engine on the turntable. In the language of Judge Grosscup in the case of *U. S. v. Debs* (in the United States district court of Illinois) 65 Fed. 211:

"I do not concur in this view. The defendants are properly chargeable with an intent to do all the acts that are the reasonable and natural consequence of the acts done. The laws make all the railways post routes of the United States, and it is within every one's knowledge that a large portion of the passenger trains on these roads carry the mail. There is no stretch, therefore, either of law or common sense, to presume the person obstructing one of those trains contemplates, among other intents, the obstruction of the mail."

[781] And in *U. S. v. Debs*, 64 Fed. 764, Judge Woods, of the circuit court, uses the following language:

"The rule is well settled, and I suppose well understood, that all who engage, either as principals, or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. * * * 'A man may be guilty of a wrong which he did not specifically intend (says Bishop), if it came naturally, or even accidentally, through some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable.'"

But, aside from this responsibility which the law imposes upon those who commit unlawful acts, the testimony of the defendants Mayne and Cassidy may throw some light on the real motive that actuated the defendants in killing the engine at Palo Alto. When asked by Cornwall if he did not think he had done something serious in stopping the mail, he admits that he replied: "Even if I have, this is a hell of a time to come and tell us of it, after it is all over." And, hearing, soon after, that an officer was after them, the defendants fled from that place. Was the motive "deviltry," as Mayne says; and the consequences, whatever they might be? Was the motive "to be in the swim," as Cassidy says; and the consequences, whatever they might be? If so, how can they avoid responsibility for such consequences?

In considering the testimony relating to the whole case, it

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will be for you to determine whether there was such a general conspiracy as claimed by the government, involving the members of the American Railway Union in a combination and concert of action to obstruct and retard the passage of the mails of the United States, and in restraint of trade and commerce, and whether these defendants were members of that conspiracy; but you may also consider the case, under this indictment, within much narrower limits. A conspiracy may have been formed between these defendants, at Palo Alto, while Mayne, Cassidy, Clark, and Rice were sitting under the tree at University Park, to commit an offense against the United States, in obstructing and retarding the passage of the United States mails, and in restraint of trade and commerce, and in pursuance of such conspiracy they committed the overt act of killing the engine on the turntable; and if you believe from the testimony, beyond a reasonable doubt, that they did at that time form a conspiracy to commit such an offense and committed the act they did in pursuance of that conspiracy, it will be your duty to find the defendants guilty on the facts involved in that occurrence alone, without regard to the testimony relating to occurrences elsewhere.

REASONABLE DOUBT.

This is a criminal case. The presumption of innocence is in favor of the defendants. A mere preponderance of testimony, in a criminal case, is not sufficient to justify a verdict of guilty. The burden [782] of proof is upon the prosecution, and it must prove every material fact, and establish the guilt of the defendants to your satisfaction, beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors, so that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the accused. By 'reasonable doubt,' I mean a reasonable doubt arising out of the evidence, and not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon, or decline to act upon,

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when his own concerns are involved,—a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence. When such a doubt exists, the accused is entitled to its benefit, and should be acquitted. But where the evidence is satisfactory to the impartial mind that the crime was committed; that the defendant committed it as charged,—when the mind comes naturally and reasonably to this conclusion, from a fair consideration of the evidence, properly, there can be no reasonable doubt, and the prisoner should be convicted.

JURY SOLE JUDGES OF CREDIBILITY OF THE WITNESSES.

Now, in relation to all the testimony in this case, you, gentlemen of the jury, are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives; by contrary evidence. And you are the exclusive judges of his credibility. In judging the credibility of the witnesses in this case (and their testimony is, to some extent, conflicting), you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in doing so consider all the circumstances under which any witness has testified, his demeanor, his manner while on the stand, the relations which he bears to the government or the defendants, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and any construction that tends to shed light upon his credibility, and to determine the amount of credence to which each statement is entitled at your hands, as reasonable and intelligent men; but, in this respect, you must remember that your power and duty to judge the effect of evidence is not arbitrary. It must be exercised with legal discretion, and in subordination to the rules of evidence. This is a government of law,

Syllabus.

and you are charged with its administration in this case without fear, favor, or partiality. An honest, fair, and impartial trial of persons accused of crime is the highest obligation we owe to society. The law, properly administered, affords protection alike to the high and the low, to the rich and the poor. Popular clamor should not direct [783] it, nor the insinuating influence of prejudice turn it aside. Courts never appeal to the passions, prejudices, or sympathies of a jury, in favor of a prosecution, or against the accused. They seek only equal and exact justice, and appeal only to reason. In this light only is the case presented to you by the court, and it is with the utmost confidence in your reason and intelligence, and in the fullest belief that you highly appreciate the important duty imposed upon you, that I commit this case to your careful and patient consideration.

NOTE.—The jury, after deliberating four days and nights, failed to agree, and were discharged. On the final ballot, 10 jurymen voted for conviction, and 2 for acquittal, upon the count for conspiracy to retard the mails, and 8 for conviction, and 4 for acquittal, on the count for conspiring to obstruct and interfere with interstate commerce.

[564] IN RE DEBS, Petitioner.*

ORIGINAL.

No. 11. Original. Argued March 25, 26, 1895.—Decided May 27, 1895.

[158 U. S., 564.]

The order of the Circuit Court finding the petitioners guilty of contempt, and sentencing them to imprisonment, was not a final judgment or decree.^b

The government of the United States has jurisdiction over every foot of soil within its territory, and acts directly upon each citizen.

While it is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the [565] power over interstate commerce and the power over the transmission of the mails.

* Debs found guilty of contempt of court and sentenced to imprisonment for six months (64 Fed., 724). See p. 322. Petition for writ of habeas corpus denied by Supreme Court (158 U. S., 564). Debs was also indicted, with others, for conspiracy to obstruct the mails (65 Fed., 210). This latter decision not reprinted. Anti-trust law not considered.

^b Syllabus and abstract of argument copyrighted, 1895, by Banks & Bros.

Statement of the Case.

The powers thus conferred are not dormant, but have been assumed and put into practical exercise by Congressional legislation.

In the exercise of those powers the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails.

While it may be competent for the government, through the executive branch and in the use of the entire executive power of the Nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and the character of any of them, and if such are found to exist or threaten to occur, to invoke the powers of those courts to remove or restrain them, the jurisdiction of courts to interfere in such matters by injunction being recognized from ancient times and by indubitable authority.

Such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law, or by the fact that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; as the penalty for a violation of such injunction is no substitute for, and no defence to, a prosecution for criminal offences committed in the course of such violation.

The complaint filed in this case clearly shows an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mails, not only temporarily existing, but threatening to continue, and under it the Circuit Court had power to issue its process of injunction.

Such an injunction having been issued and served upon the defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been disobeyed, to proceed under Rev. Stat. § 725, and to enter the order of punishment complained of.

The Circuit Court having full jurisdiction in the premises, its findings as to the act of disobedience are not open to review on *habeas corpus* in this or any other court.

The court enters into no examination of the act of July 2, 1890, c. 647, 28 Stat. 209, on which the Circuit Court mainly relied to sustain its jurisdiction; but it must not be understood that it dissents from the conclusions of that court in reference to the scope of that act, but simply that it prefers to rest its judgment on the broader ground discussed in its opinion, believing it important that the principles underlying it should be fully stated and fully affirmed.

ON July 2, 1894, the United States, by Thomas E. Milchrist, district attorney for the Northern District of Illinois, under the direction of Richard Olney, Attorney General, filed their [566] bill of complaint in the Circuit Court of the United States for the Northern District of Illinois

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against these petitioners and others. This bill set forth, among other things, the following facts: It named twenty-two railroad companies, and it alleged that they were engaged in the business of interstate commerce and subject to the provisions of the act of Congress of February 4, 1887, known as "the Interstate Commerce Act," and all other laws of the United States relating to interstate transportation of passengers and freight; that the number of passengers annually carried by them into the city of Chicago from other States than Illinois, and out of Chicago into other States than Illinois, was more than twelve millions, and in like manner that the freight so carried into and out of the city of Chicago, from and into other States than Illinois, amounted to many millions of tons; that each of the roads was under contract to carry, and in fact carrying, the mails of the United States; that all were by statute declared post roads of the government; that many were by special acts of Congress required at any and all times to carry the troops and military forces of the United States, and provisions, munitions, and general supplies therefor; and that two of them were in the hands of receivers appointed by the courts of the United States. It stated at some length the necessity of the continued and uninterrupted running of such interstate railroads for the bringing into the city of Chicago supplies for its citizens and for the carrying on of the varied industries of that city.

The bill further averred that four of the defendants, naming them, were officers of an association known as the American Railway Union; that in the month of May, 1894, there arose a difference or dispute between the Pullman Palace Car Company and its employés, as the result of which a considerable portion of the latter left the service of the car company: that thereafter the four officers of the railway union combined together, and with others, to compel an adjustment of such dispute, by creating a boycott against the cars of the car company; that, to make such boycott effective, they had already prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend [567] such boycott against Pullman sleeping cars by causing strikes among employés of all railroads attempting

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to haul the same. It charged knowledge on the part of the defendants of the necessity of the use of sleeping cars in the operation of the business of the railroads as common carriers, of the contracts for such use between the railroad companies and the car company, of the contracts, laws, and regulations binding the railway companies and the receivers to the carrying of the mails; also of the fact that sleeping cars were and of necessity must be carried upon the trains of said carriers with cars containing the mails; that with this knowledge they entered into a combination and conspiracy to prevent the railroad companies and the receivers, and each of them, from performing their duties as common carriers of interstate commerce, and in carrying into execution that conspiracy did induce various employés of the railway companies to leave the service of the companies, and prevent such companies and the receivers from securing other persons to take their places; that they issued orders, notifications, etc., to the members of the railway union to leave the service of the companies and receivers, and to prevent the companies and receivers from operating their trains; that they had asserted that they could and would tie up, paralyze, and break down any and every of said railway companies and receivers which did not accede to their demands; that in pursuance of the instructions, commands, and requests of said officers large numbers of the employés of the railway companies and receivers left their service.

Then followed these allegations:

"And your orator further charges that said defendants aimed and intended and do now aim and intend in and by the said conspiracy and combination, to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises save according to the will and with the consent of the defendants.

[568] " Your orator further avers that in pursuance of said combination and conspiracy and to accomplish the purpose thereof as hereinbefore set forth, the said defendants Debs, Howard, Rogers, Kellher and others, officers of said American Railway Union, issued or caused to be issued the orders and directions as above set forth, and that in obedience of such orders and in pursuance of said conspiracy and combination, numerous employés of said railroad companies and receivers unitedly refused to obey the orders of said employers or to perform the usual duties of such service, and many others of such employés quit

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such service with the common purpose, and with the result of preventing said railroad companies and receivers from operating their said railroads and from transporting the United States mails, and from carrying on or conducting their duties as common carriers of interstate traffic.

"Your orator further avers that, pursuant to said combination and conspiracy, and under the direction as aforesaid of said officers and directors of said American Railway Union, said other defendants and other persons whose names are to your orator unknown, proceeded by collecting together in large numbers, by threats, intimidation, force and violence at the station grounds, yards and right of way of said railroad companies, respectively, in the State of Illinois, to prevent said railroad companies from employing other persons to fill the vacancies aforesaid; to compel others still employes of said railroad companies to quit such employment and to refuse to perform the duties of their service, and to prevent the persons remaining in such service and ready and willing to perform the duties of the same, from doing so.

"Your orator further avers that said defendants, in pursuance of said combination and conspiracy, acting under the direction of said officers and directors of said American Railway Union, did with force and violence at divers times and places within said State of Illinois and elsewhere, stop, obstruct and derail and wreck the engines and trains of said railroad companies, both passenger and freight, then and there engaged in interstate commerce and in transporting United States mails, by locking the switches of the railroad of said [569] railroad companies, by removing the spikes and rails from the track thereof, by turning switches and displacing and destroying signals, by assaulting and interfering with and disabling the switchmen and other employes of said railroad companies having charge of the signals, switches and tracks of said companies, and the movement of trains thereon, and in other manners by force and violence, depriving the employes of said railroad companies in charge of such trains of the control and management of the same, and by these and other unlawful means attempted to obtain and exercise absolute control and domination over the entire operations of said railroads."

The bill further set forth that there had become established in the city of Chicago a business conducted under the name of the Union Stock Yards, at which for many years immense numbers of live stock from States and Territories beyond the State of Illinois had been received, slaughtered, and converted into food products, and distributed to all quarters of the globe, and that all the large centres of population in the United States were in a great degree dependent upon those stock yards for their food supply of that character; that for the purpose of handling such live stock and the product thereof the company conducting such business operated certain railroad tracks, and that in pursuance of the combination and conspiracy aforesaid the four defendants, officers of the railway union, issued orders directing all the employes handling such railroad tracks to abandon such service.

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To this was added the following:

"And your orator further alleges that in pursuance of a like combination and unlawful conspiracy, the said defendants and others combining and conspiring with them for the purpose of still further restraining and preventing the conduct of such business, have by menaces, threats and intimidation prevented the employment of other persons to take the place of the employes quitting the service of said company so operating said Union Stock Yards.

"And your orator further charges that by reason of said unlawful combination and conspiracy and the acts and doings aforesaid thereunder, the supply of coal and fuel for consump- [570] tion throughout the different States of the Union and of grain, breadstuffs, vegetables, fruits, meats and other necessities of life, has been cut off, interrupted and interfered with, and the market therefor made largely unavailable, and dealers in all of said various products and the consumers thereof have been greatly injured, and trade and commerce therein among the States has been restrained, obstructed and largely destroyed."

The bill alleged that the defendants threatened and declared that they would continue to restrain, obstruct, and interfere with interstate commerce, as above set forth, and that they "will if necessary to carry out the said unlawful combination and conspiracy above set forth tie up and paralyze the operations of every railway in the United States, and the business and industries dependent thereon." Following these allegations was a prayer for an injunction. The bill was verified.

On presentation of it to the court an injunction was ordered commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following named railroads," (specifically naming the various roads named in the bill,) "as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the States; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling stock of any of said companies engaged in interstate commerce, or in connection with the car-

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riage of passengers or freight between or among the States; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce or the carriage of [571] the mails of the United States or the transportation of passengers or freight between or among the States; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the States, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the States; and from injuring or destroying any part of the tracks, roadbed, or road, or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads; and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the States, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of the employés of any said railroads who are employed by such railroads, and engaged in its service in the

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conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the States, [572] to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force, or violence from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting, or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

"And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpoena herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpoena upon any of said defendants named herein shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction."

This injunction was served upon the defendants—at least upon those who are here as petitioners. On July 17 the district attorney filed in the office of the clerk of said court an information for an attachment against the four defendants, officers of the railway union, and on August 1 a similar information against the other petitioners. A hearing was had before the Circuit Court, and on December 14 these petitioners were found guilty of contempt, and sentenced to [573] imprisonment in the county jail for terms varying from three to six months. 64 Fed. Rep. 724. Having been committed to jail in pursuance of this order they, on January 14, 1895, applied to this court for a writ of error and also

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one of *habeas corpus*. The former was, on January 17, denied, on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.

Mr. Lyman Trumbull for petitioners.

I. The extraordinary proceeding under which the prisoners were deprived of liberty, was commenced by the filing of a bill in equity in the name of the United States, by a district attorney, under the direction of the Attorney General. The bill is unsigned by any one, and has attached to it an affidavit of George Q. Allen, an unknown person, having no connection, so far as the record shows, with the case, stating that he has read the bill, and "believes the statements therein contained are true." The bill was filed July 2. The same day an injunction was issued, without notice to anybody, against the prisoners and unknown persons, and the next day was served on some of the prisoners. The bill states that twenty-two railroads and railroad companies, and among them the Union Stock Yard and Transit Company, were chartered and organized for the purpose of continuously doing the business of common carriers of passengers and freight generally, and were doing such business among the different States. So far from having such power as alleged, the Union Stock Yard and Transit Company, one of the roads named, was organized for the purpose of locating and conducting stock yards and connecting them by rail with railroads entering Chicago on the south side, and transporting between said cattle yards, "cattle and live stock and persons accompanying the same," and by the 11th section of its charter it is declared: "Nothing in this act contained shall be taken or construed as conferring upon the company hereby created any power or authority to maintain or operate a railroad for the conveyance of passengers or freight within the city of Chicago."

[574] A large part of the bill is devoted to a statement of the amount of business done at the Union Stock Yards, the quitting of work by the employés of the company, the handling of live stock and its conversion into food, etc.

The bill states that the prisoners are officers and members.

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of an organization known as the American Railway Union; that in May, 1894, a dispute arose between the Pullman Palace Car Company and its employes which resulted in the employes leaving the service of the company; that the prisoners, officers of the American Railway Union combining together, and with others unknown, with the purpose to compel an adjustment of the said difference and dispute between said Pullman Co. and its employes, caused it to be given out through the newspapers of Chicago, generally, that the American Railway Union would at once create a boycott against the cars manufactured by said Pullman Palace Co., and that in order to make said boycott effective, the members of the American Railway Union who were some of them employed as trainmen or switchmen, or otherwise, in the service of the railroads mentioned, which railroads or some of them are accustomed to haul the sleeping cars manufactured by the Pullman Palace Car Co., would be directed to refuse to perform their usual duties for said railroad companies and receivers in case said railroad companies thereafter attempted to haul Pullman sleeping cars.

Such is the gist of the bill. All that is subsequently alleged as to what was done by the prisoners, was for the purpose of compelling an adjustment of the difference between the Pullman Company and its employes. To accomplish this, the American Railway Union called upon its members to quit work for the companies which had persisted in hauling the Pullman cars. Was there anything unlawful in this? If not, then the prisoners and the members of the American Railway Union were engaged in no unlawful combination or conspiracy. The allegation that the prisoners, officers and directors of the American Railway Union did issue and promulgate certain orders and requests to the members of the union in the service of certain railway companies in pursuance of said [575] unlawful purpose or conspiracy, did not make the purpose unlawful, when the facts stated in the bill show that the purpose was not unlawful. All that the prisoners are charged with threatening to do, or having done, was for the purpose, primarily, of bringing about an adjustment of the differences between the Pullman Company and its employes. It is only incidentally in pursuit of this lawful

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purpose that prisoners are charged with obstructing commerce.

The boycott of the Pullman sleepers was, as the bill shows, not to obstruct commerce, but for an entirely different purpose.

It was not unlawful for the American Railway Union to call off the members of the organization, although it might incidentally affect the operation of the railroads. Refusing to work for a railroad company is no crime, and though such action may incidentally delay the mails or interfere with interstate commerce, it being a lawful act, and not done for that purpose, is no offence.

II. In the proceeding now before the court the main question is whether the bill states a case over which a court of equity has jurisdiction; if not, then the injunction was void and the prisoners are entitled to their discharge.

This court has often said that equity jurisdiction of the Federal courts is such as was exercised by the high court of chancery of England at the time of the adoption of the Constitution, or has been conferred upon them by Congress. *Mills v. Cohn*, 150 U. S. 202.

This is not a bill by the owner of property to prevent an irreparable injury. The government does not own the railroads. It is a bill by the government to prevent interference with the private property of the citizen, lest such interference restrain commerce among the States.

It was said by this court, (*License Tax Cases*, 5 Wall. 470,) alluding to the internal commerce or domestic trade of the States: "Over this commerce Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of [576] powers clearly granted to the legislature." *Genesee Chief*, 12 How. 443, 452; *Veazie v. Moor*, 14 How. 568.

The chancery court of England entertained no such jurisdiction when the Constitution was adopted.

If the prisoners were guilty of an offence against the United States by any acts which interfered with the trans-

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portation of the mails, the laws provide for their punishment; but equity has no jurisdiction to grant an injunction to stay proceedings in a criminal matter. "If they did," said Chief Justice Holt, "the court of Queen's Bench would break it, and protect any that would proceed in contempt of it." Accordingly, in the case of *Lord Montague v. Dudman*, Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a mandamus issued to compel the lord of a manor to hold a court. "The court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, or an information, or a writ of prohibition." 3 Perkins' ed. Daniell's Ch. Pr. 1721.

III. It is not in the power of Congress to confer upon a court of equity jurisdiction unless of an equitable nature, which jurisdiction over crimes is not. The Constitution recognizes and confers upon the judicial department jurisdiction in certain cases in law and equity, and provides that trial of all crimes, except in cases of impeachment, shall be by jury, and in common law cases preserves the right of trial by jury. It is not competent for Congress to break down this distinction between law and equity by conferring upon courts of equity, jurisdiction of criminal and common law cases and thereby deny parties the right to a jury trial.

The act to protect trade and commerce against unlawful restraints and monopolies does not apply to the case stated in the bill. If it does, then it is unconstitutional. If a court of equity is authorized to restrain and prevent persons from the commission of crimes or misdemeanors prohibited by law, it must have the power to enforce its restraining order. In this case some of the parties are sentenced to imprisonment for six months, and for what? For doing some of the things forbidden by a criminal statute. If they have done none of the [577] things forbidden, they have not violated the injunction, for it could only restrain them from doing what the law forbade. It follows that by indirection a court of equity under its assumed jurisdiction to issue injunctions and punish for contempts, is made to execute a criminal statute and deprive persons of their liberty without a jury trial. This a court of equity has no power

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to do, nor is it competent for Congress to confer such a power on a court of equity.

Mr. Assistant Attorney General Whitney for the United States.

Mr. S. S. Gregory for the petitioners.

Mr. Edwin Walker for the United States.

Mr. Attorney General for the United States.

Mr. C. S. Darrow for the petitioners.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty.

[578] First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

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"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 405, 424.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." Chief Justice Chase in *Lane County v. Oregon*, 7 Wall. 71, 76.

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to [579] it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.'" Mr. Justice Bradley in *Ex parte Seibold*, 100 U. S. 371, 395. See also, *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 136; *Cohens v. Virginia*, 6 Wheat. 264, 413; *Legal Tender Cases*, 12 Wall. 457, 555; *Tennessee v. Davis*, 100 U. S. 257; *The Chinese Exclusion Case*, 130 U. S. 581; *In re Neagle*, 135 U. S. 1; *Logan v. United States*, 144 U. S. 263; *Fong Yue Ting v. United States*, 149 U. S. 698; *In re Quarles*, ante, 532.

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. Article I, section 8, of the Constitution provides that "the Congress shall have power. . . . Third, to regulate commerce with foreign nations and among the several States, and with the Indian tribes. . . . Seventh, to establish post offices and post roads."

Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by for the present all that legislation in respect to commerce

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by water, and considering only that which bears upon railroad interstate transportation, (for this is the specific matter involved in this case,) these acts may be noticed: First, that of June 15, 1866, c. 124, 14 Stat. 66, carried into the Revised Statutes as section 5258, which provides:

"Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore, Be it enacted by the [580] *Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

Second. That of March 3, 1873, c. 252, 17 Stat. 584, (Rev. Stat. §§ 4386 to 4389,) which regulates the transportation of live stock over interstate railroads. Third. That of May 29, 1884, c. 60, § 6, 23 Stat. 31, 32, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4, 1887, c. 104, 24 Stat. 379, with its amendments of March 2, 1889, c. 382, 25 Stat. 855, and February 10, 1891, c. 128, 26 Stat. 743, known as the "interstate commerce act," by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the sixteenth section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1, 1888, c. 1063, 25 Stat. 501, providing for arbitration between railroad interstate companies and their employés; and, sixth, the act of March 2, 1893, c. 196, 27 Stat. 531, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions.

Under the power vested in Congress to establish post offices and post roads, Congress has, by a mass of legislation, established the great post office system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the

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prices of carriage, and also prescribing penalties for all offences against it.

Obviously these powers given to the national government over interstate commerce and in respect to the transportation [581] of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offences against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the

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said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation [582] of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. In *Stamford v. Stamford Horse Railroad Co.*, 56 Connecticut, 381, an injunction was asked by the borough to restrain the company from laying down its track in a street of the borough. The right of the borough to forcibly remove the track was insisted upon as a ground for question-

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ing the jurisdiction of a court of equity, but the court sustained the injunction, adding: "And none the less so because of its right to remove [583] the track by force. As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance and in some cases of trespass the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action. Therefore, as between force and the extraordinary writ of injunction, the rule will permit the latter."

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. *Searight v. Stokes*, 3 How. 151, 169, arose upon a compact between the United States and the State of Pennsylvania in respect to the Cum-

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berland Road, which provided, among other things, "that no toll shall be [584] received or collected for the passage of any wagon or carriage laden with the property of the United States;" the question being whether a carriage employed in transporting the mails of the United States was one "laden with the property of the United States," and it was held that it was, the court, by Chief Justice Taney, saying: "The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of communications to or from the officers of the executive departments, or members of the legislature, on public service, or in relation to matters of public concern. . . . We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact."

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court. In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285, was presented an application of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed, though it was held that if the controversy was really one only between individuals in respect to their claims to property the government ought not to be permitted to interfere, the court saying: "If it be a question of property

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a case must be made in which the court can afford a remedy in [585] regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

This language was relied upon in the subsequent case of *United States v. Bell Telephone Company*, 128 U. S. 315, 367, which was a suit brought by the United States to set aside a patent for an invention on the ground that it had been obtained by fraud or mistake, and it was claimed that the United States, having no pecuniary interest in the subject-matter of the suit, could not be heard to question the validity of the patent. But this contention was overruled, the court saying, in response to this argument, after quoting the foregoing language from the *San Jacinto* case: "This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which

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are not excluded [586] from the jurisdiction of the court by want of interest in the government of the United States."

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.

As said in *Gilman v. Philadelphia*, 3 Wall. 713, 724: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."

See also the following authorities in which at the instance

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of [587] the State, or of some municipality thereof within whose limits the obstructed highway existed, a like power was asserted: *Stamford v. Stamford Horse Railroad Co.*, 56 Connecticut, 381; *People v. Vanderbilt*, 28 N. Y. 396; *State v. Dayton & Southeastern Railroad*, 36 Ohio St. 434; *Springfield v. Connecticut River Railroad*, 4 Cush. 63; *Attorney General v. Woods*, 108 Mass. 436; *Easton and Amboy Railroad Co. v. Greenwich*, 25 N. J. Eq. 565; *Stearns County v. St. Cloud, Mankato and Austin Railroad*, 36 Minnesota, 425; *Rio Grande Railroad Co. v. Brownsville*, 45 Texas, 88; *Philadelphia v. 13th & 15th Street Passenger Railway Co.*, 8 Phil. 648. Indeed, the obstruction of a highway is a public nuisance, 4 Bl. Com. 167,* and a public nuisance has always been held subject to abatement at the instance of the government. *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 244; *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361; *Village of Pine City v. Munch*, 42 Minnesota, 342; *State v. Goodnight*, 70 Texas, 682.

It may not be amiss to notice a few of the leading cases. *City of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 98, was a bill filed by the plaintiff to restrain the construction of an aqueduct across the Potomac River. While under the facts of that case the relief prayed for was denied, yet, the jurisdiction of the court was sustained. After referring to the right to maintain an action at law for damages, it was said:

"Besides this remedy at law, it is now settled, that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the Attorney General. This jurisdiction seems to have been acted on with great caution and hesitancy. . . . Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it."

[588] *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, was a bill filed by the State of Pennsylvania to enjoin the erection of a bridge over the Ohio River within the limits of the State of Virginia. As the alleged obstruction was not within the State of Pennsylvania, its right to relief

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was only that of an individual in case of a private nuisance, and it was said, on page 564 :

"The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

"Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And, in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia. The Ohio being a navigable stream, subject to the commercial power of Congress, and over which that power has been exerted, if the river be within the State of Virginia, the commerce upon it, which extends to other States, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the bridge company."

Coosaw Mining Co. v. South Carolina, 144 U. S. 550, was a bill filed by the State in one of its own courts to enjoin the digging, mining, and removing phosphate rock and deposits in the bed of a navigable river within its territories. The case was removed by the defendant to the Federal court, and in that court the relief prayed for was granted. The decree of the Circuit Court was sustained by this court, and in the opinion by Mr. Justice Harlan, the matter of equity jurisdiction is discussed at some length, and several cases cited, among them *Attorney General v. Richards*, 2 Anstr. 603; *Attorney [589] General v. Forbes*, 2 My. & Cr. 123; *Gibson v. Smith*, 2 Atk. 182; *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361. From *Attorney General v. Forbes* was quoted this declaration of the Lord Chancellor: "Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors; and the Court of Exchequer, as well as this court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads; and, in short, generally to prevent public nuisances." And from *Attorney General v. Jamaica Pond Aqueduct* these words of the Supreme Court of the State of Massachusetts: "There is another ground upon which, in our opinion, this information

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can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. . . . If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the Attorney General to restrain and prevent the mischief." An additional case, not noticed in that opinion, may also be referred to, *Attorney General v. Terry*, L. R. 9 Ch. 423, in which an injunction was granted against extending a wharf a few feet out into the navigable part of a river, Mellish, L. J., saying: "If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction," and James, L. J., adding: "I entirely concur. Where a public body is entrusted with the duty of being conservators of a river, it is their duty to take proceedings for the protection of those who use the river."

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to [590] waterways—the natural highways of the country—and not over artificial highways such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 14, 1866, but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a State; its jurisdiction there is like that over land within the same State. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of *Gibbons v. Ogden*, 9 Wheat. 1, 197, in which the control of Congress over inland waters was

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asserted, rested that control on the grant of the power to regulate commerce. The argument of the Chief Justice was that commerce includes navigation, "and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" In order to fully regulate commerce with foreign nations it is essential that the power of Congress does not stop at the borders of the nation, and equally so as to commerce among the States:

"The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies."

See also *Gilman v. Philadelphia*, 3 Wall. 713, 725, in which it was said: "Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent [591] years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will oper-

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ate with equal force upon any new modes of such commerce which the future may develop.

It is said that seldom have the courts assumed jurisdiction to restrain by injunction in suits brought by the government, either state or national, obstructions to highways, either artificial or natural. This is undoubtedly true, but the reason is that the necessity for such interference has only been occasional. Ordinarily the local authorities have taken full control over the matter, and by indictment for misdemeanor, or in some kindred way, have secured the removal of the obstruction and the cessation of the nuisance. As said in *Attorney General v. Brown*, 24 N. J. Eq. (9 C. E. Green) 89, 91: "The jurisdiction of courts of equity to redress the grievance of public nuisances by injunction is undoubted and clearly established; but it is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals. *Attorney General v. New Jersey Railroad*, 2 C. E. Green, (17 N. J. Eq.,) 136; *Jersey City v. City of Hudson*, 2 Beasley, (13 N. J. Eq.,) 420, 426; *Attorney [592] General v. Heishon*, 3 C. E. Green, (18 N. J. Eq.,) 410; *Morris & Essex Railroad v. Prudden*, 5 C. E. Green, (20 N. J. Eq.,) 530, 532; High on Injunctions, § 521. And because the remedy by indictment is so efficacious, courts of equity entertain jurisdiction in such cases with great reluctance, whether their intervention is invoked at the instance of the attorney general, or of a private individual who suffers some injury therefrom distinct from that of the public, and they will only do so where there appears to be a necessity for their interference. *Rowe v. The Granite Bridge Corporation*, 21 Pick. 340, 347; *Morris & Essex Railroad v. Prudden*, *supra*. The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. 3 Daniell's Ch. Pr. 3d ed. Perkins's, 1740." Indeed, it may be affirmed that in no well-considered case has the power of a court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of the particular case. Story's Eq. Jur. §§ 921, 923, 924; Pomeroy's Eq. Jur. § 1349; High

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on Injunctions, §§ 745 and 1554; 2 Daniell's Ch. Pl. and Pr. 4th ed. p. 1636.

That the bill filed in this case alleged special facts calling for the exercise of all the powers of the court is not open to question. The picture drawn in it of the vast interests involved, not merely of the city of Chicago and the State of Illinois, but of all the States, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all the powers of the courts. If ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations.

The difference between a public nuisance and a private nuisance [593] is that the one affects the people at large and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. Of course, circumstances may exist in one case, which do not in another, to induce the court to interfere or to refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance. True, many more suits are brought by individuals than by the public to enjoin nuisances, but there are two reasons for this. First, the instances are more numerous of private than of public nuisances; and, second, often that which is in fact a public nuisance is restrained at the suit of a private individual, whose right to relief arises because of a special injury resulting therefrom.

Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when

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such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. Thus, in *Cranford v. Tyrrell*, 128 N. Y. 341, an injunction to restrain the defendant from keeping a house of ill-fame was sustained, the court saying, on page 344: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner." And in *Mobile v. Louisville & Nashville Railroad*, 84 Alabama, 115, 126, is a similar declaration in these words: "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable [594] injury which will result from the failure or inability of a court of law to redress such rights."

The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offences which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defence to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here, the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offences alleged in the bill of complaint, of derailing and wrecking engines and trains, assaulting and disabling employes of the railroad companies, it will be no defence to such prosecution

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that they disobeyed the orders of injunction served upon them and have been punished for such disobedience.

Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that "it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts," and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, that "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And [595] this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. In the *Case of Yates*, 4 Johns. 314, 369, Chancellor Kent, then Chief Justice of the Supreme Court of the State of New York, said: "In the *Case of The Earl of Shaftesbury*, 2 St. Trials, 615; *S. C.* 1 Mod. 144, who was imprisoned by the House of Lords for 'high contempts committed against it,' and brought into the King's Bench, the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of the *Queen v. Paty and others*, and of the *King v. Crosby*." And again, on page 371, "Mr. Justice Blackstone pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of Parliament, and the

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courts of Westminster Hall, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof belonged exclusively, and without interfering, to each respective court." In *Watson v. Williams*, 36 Mississippi, 331, 341, it was said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." In *Cartwright's Case*, 114 Mass. 230, 238, we find this language: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." See also *United States v. Hudson*, 7 Cranch, 32; *Anderson v. Dunn*, 6 Wheat. 204; *Ex parte Robinson*, 19 Wall. 505; *Mugler v. Kansas*, 123 U. S. 623, 672; *Ex parte Terry*, 128 U. S. 289; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 36, in which Mr. Justice Miller observed: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it;" *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 488. In this last case it was said "surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."

In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.

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Further, it is said by counsel in their brief:

"No case can be cited where such a bill in behalf of the sovereign has been entertained against riot and mob violence, though occurring on the highway. It is not such fitful and temporary obstruction that constitutes a nuisance. The strong hand of executive power is required to deal with such lawless demonstrations.

"The courts should stand aloof from them and not invade executive prerogative, nor even at the behest or request of the executive travel out of the beaten path of well-settled judicial authority. A mob cannot be suppressed by injunction; nor can its leaders be tried, convicted, and sentenced in equity.

"It is too great a strain upon the judicial branch of the [597] government to impose this essentially executive and military power upon courts of chancery."

We do not perceive that this argument questions the jurisdiction of the court, but only the expediency of the action of the government in applying for its process. It surely cannot be seriously contended that the court has jurisdiction to enjoin the obstruction of a highway by one person, but that its jurisdiction ceases when the obstruction is by a hundred persons. It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late civil war. It is doubtless true that *inter arma leges silent*, and in the throes of rebellion or revolution the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people and their recognition of the fact that peaceful remedies are the true resort for the correction of wrongs. But does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts? We find in the opinion of the Circuit Court a quotation from the testimony given by one of the defendants before the United States Strike Commission, which is sufficient answer to this suggestion:

"As soon as the employes found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances, if we had

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been permitted to remain upon the field among them. Once we were taken from the scene of action, and restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. [598] . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, . . . not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employes."

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States.

It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tend to show that the defendants were engaged in such obstructions.

A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defence of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson [599] which cannot be learned too soon or too thoroughly that under this government of and by the people the means of

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redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the coöperation of a mob, with its accompanying acts of violence.

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of [600] injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the

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passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Revised Statutes, which grants power “to punish, by fine or imprisonment, . . . disobedience, . . . by any party . . . or other person, to any lawful writ, process, order, rule, decree or command,” and enter the order of punishment complained of; and, finally, that, the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Terry*, 128 U. S. 289, 305; *In re Swan*, 150 U. S. 637; *United States v. Pridgeon*, 153 U. S. 48.

We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.

The petition for a writ of *habeas corpus* is

Denied.

[908] LOWENSTEIN *v.* EVANS ET AL.

(Circuit Court, D. South Carolina. October 9, 1895.)

[69 Fed., 908.]

MONOPOLIES AND TRUSTS—MONOPOLY BY STATE.—The act of July 2, 1890 (26 Stat. 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895). A state is neither a “person” nor a “corporation,” within the meaning of the act of congress.*

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Complaint.

SAME—NECESSARY PARTIES—JURISDICTION OF FEDERAL COURTS.—

Where a person brings an action under section 7 of the anti-trust law of July 2, 1890, against the officials of a state, to recover damages for acts done under authority of a state statute, which gives the state an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895), the state itself is a necessary party thereto, and consequently the federal courts would have no jurisdiction of the action.

This was an action brought under the seventh section of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The complaint was as follows:

The complaint of the above-named plaintiff respectfully shows to this court: (1) That the plaintiff, Julius Lowenstein, is a citizen of the state of North Carolina, and is engaged in business in Statesville in said state, under the name and style of Lowenstein & Co. (2) That the defendants are each and all of them citizens of the state of South Carolina. (3) That the defendants John Gary Evans, D. H. Tompkins, and James Norton, styling themselves a "State Board of Control," and the defendant Frank M. Mixson, styling himself "State Commissioner," together with divers other persons, to the plaintiff unknown, prior to the time hereinafter mentioned, under the pretended authority of a certain act of the legislature of the state of South Carolina, entitled "An act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina, and to police the same," approved January 2, 1895, combined to monopolize a certain part of the trade and commerce among the states and foreign nations, to wit, the trade in alcoholic liquids and liquors, including whiskys, brandies, wines, ales, and beer, to prevent the purchase of such whiskys, brandies, wines, ales, and beer from citizens of other states and foreign nations, and to prevent the importation thereof into this state in restraint of the trade and commerce between the states and foreign nations, and to discriminate against the products of other states and the citizens of other states, in favor of the products of the state of South Carolina and the citizens of said state, which said legislative enactment the plaintiff is advised and therefore alleges is null and void, in this: that the same is in contravention of an act of congress entitled "An act to protect trade and commerce against unlawful restraint and monopoly," approved July 2, A. D. 1890, in that the said legislative enactment undertakes to and does create a monopoly in the traffic in alcoholic liquors, and operates as a restraint upon the trade among the states and foreign nations in such traffic. (4) That the plaintiff now is, and was at the time hereinafter mentioned, engaged in the business of a manufacturer and wholesale dealer in spirituous liquors at Statesville, in the state of North Carolina, and in the prosecution and conduct of his said business, and, in the exercise of the right to engage in interstate commerce, he had from time to time sold, shipped, and delivered whiskys and other liquors to persons residing in states, other than the state of North Carolina; that in pursuance of his said business, and in exercise of the rights conferred by and reserved in the constitu-

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tion and laws of the United States, on the 27th day of May, A. D. 1895, he delivered one barrel of whisky, of the value of fifty-seven and [909] $\frac{2}{100}$ dollars, to the Southern Railway Company, at Statesville, in the state of North Carolina, to be transported by said company and connecting lines to Charleston, in the state of South Carolina, marked and consigned to Thomas Hartigan, but the title to said property still remained in the plaintiff. (5) That on the 29th day of May, A. D. 1895, while the said barrel of whisky was in transit, at Columbia, in the state of South Carolina, and within this district, certain persons, to the plaintiff unknown, without warrant of law, entered the cars of the common carrier so engaged in the transportation of said whisky and of interstate commerce, and then and there took the said whisky and carried the same away, and thereafter delivered and caused said whisky to be delivered unto the defendant Frank M. Mixson, who thereupon, and in furtherance of said combination and monopoly, and in restraint of the trade and of interstate commerce, received the same, and has retained and detained the same from the plaintiff. (6) That the wrongful and unlawful acts of the said persons unknown, and of the said Frank M. Mixson, as aforesaid, in the seizure and detention of said whisky, was done in pursuance of the combination and in furtherance of the monopoly aforesaid, and by and under the directions of the other defendants, intending thereby to deter and prevent the plaintiff from engaging in trade with the citizens and residents of the state of South Carolina, and to that extent to prevent the plaintiff from engaging in interstate commerce, and for the purpose of monopolizing the trade in spirituous liquors, in contravention of the act of congress aforesaid. (7) That, by reason of the unlawful seizure and detention of said whisky, the plaintiff has been greatly injured, to his damage fifty-seven and $\frac{2}{100}$ dollars. Wherefore the plaintiff demands judgment against the defendants for three times the amount of his said damage, to wit, one hundred and seventy-one and $\frac{2}{100}$ dollars, for a reasonable attorney's fee, and for his costs, as provided in the act of congress aforesaid.

Murphy, Farrow & Legare, for plaintiff.

Wm. A. Barber, Attorney-General of South Carolina, and
O. P. Townsend, Assistant Attorney-General, for defendants.

SIMONTON, Circuit Judge.

This is an action brought under the seventh section of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647). The section is in these words:

"Any person who shall be injured in his property or business by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained and the costs of the suit, including a reasonable counsel fee."

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The act declares:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared illegal."

The cause of action set out in the complaint is on this statute of 1890, and seeks the special remedy provided in the statute. The relief is sought, not because the rights of the plaintiff were violated, but because they were violated in order to enforce and perpetuate a monopoly declared illegal by this statute. The defendants interpose a demurrer on two grounds: First, that on the face of the complaint this court has no jurisdiction of the matters and things forming the subject of this action; second, that from the face of the complaint it does not state facts sufficient to constitute a cause of action cognizable in this court.

[910]

THE JURISDICTION.

The first ground of demurrer was sustained in argument, because this is an action against the state, and the state is a necessary party thereto. The act of 1890 strikes at contracts, combinations, and conspiracies in restraint of or to monopolize trade and commerce among the several states or with foreign nations. *U. S. v. E. C. Knight Co.*, 156 U. S. 17, 15 Sup. Ct. 249. The complaint charges that the defendants Evans, Tompkins, and Norton, styling themselves a "State Board of Control," and Mixson, styling himself "State Commissioner," together with divers other persons to the plaintiff unknown, under the pretended authority of an act of the legislature of South Carolina, "giving the title of the act," combined to monopolize a certain part of the trade and commerce among the states and foreign nations, to wit, the trade in alcoholic liquids and liquors with citizens of other states and foreign nations, to prevent their importation into this state, and to discriminate against the products and citizens of other states in favor of the products and citizens of the state of South Carolina. This act of the legislature of South Carolina, the complaint avers, is void as in contravention of the act of 1890.

Does this act of the legislature of South Carolina authorize

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contracts or combinations in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations? Does it create a monopoly, and in whom? The answer to this question must be found in the act. It is entitled "An act to further declare the law in reference to and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina and to police the same," approved January 2, 1895. It is impossible after examining this act to avoid the conclusion that it declares in the state the monopoly in the purchase and sale of alcoholic liquors. Not only so, but it protects this monopoly in the state in every way possible and by the most drastic methods. Every attempt to interfere with this monopoly by the receiving, keeping, vending, giving away, or mercantile use of alcoholic liquors, is made an offense against the state, punishable by criminal proceedings in her name in her courts. The governor, secretary of state, and comptroller general are officially charged with the direction and enforcement of this monopoly. The monopoly is not given to them. They have no pecuniary interest whatever in it. All the profits of the monopoly go to the state, to be used and applied for public purposes,—increase of her revenue. The close analysis made of the act by the counsel for the plaintiff shows that this was their conviction. They find that its manifest object is to raise revenue, and not to prevent the consumption of liquor, except that owned and furnished by the state; that \$50,000 was appropriated from the public treasury for the purpose of purchasing liquors and to enable the state to go into the business of buying and selling intoxicating liquors; that liquors are not contraband, except when not purchased from a dispenser,—that is, one who holds and sells for the state; that the act creates a monopoly. So, also, Chief Justice McIver, speaking for the majority of the supreme court [911] of South Carolina, in *McCullough v. Brown*, 41 S. C. 220, 19 S. E. 458, dissecting the dispensary law, says:

"The manifest object of the act is that the state shall monopolize the entire traffic in intoxicating liquors, to the entire exclusion of all persons whomsoever, and this, too, for the purpose of profit to the state

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and its governmental agency. * * * We think it safe to say that it is an act forbidding the manufacture or sale of intoxicating liquors as a beverage within the limits of this state by any private individual, and vesting the right to manufacture and sell such liquors in the state exclusively, through certain designated officers and agents."

This act of the legislature of South Carolina evidently does not create in nor give to any individuals the monopoly. It gives it wholly and entirely to the state.

Now, the question to be decided is not as to the constitutionality of this act, nor whether it be in the lawful exercise of the police power, but whether, in declaring and asserting this monopoly in herself, and in assuming and controlling its enforcement, the state comes within the provisions of the act of congress of 1890. That act, as has been seen, declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. But by this act the state makes no contract, enters into no combination or conspiracy. She declares and asserts in herself the monopoly in the purchase and sale of liquors. The section of the act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Nor can it be said that the state is a person in the sense of this act. Even were this the case, as the monopoly now complained of is that of the state, no relief can be had without making the state a party, and this destroys the jurisdiction of this court. No opinion whatever is expressed as to the right of the plaintiff for violation of his common-law rights. In this proceeding and under the act of 1890, he must seek his remedy against the holder of the monopoly; and, as in the present case the monopoly is in the state, this court has no jurisdic-

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tion. The demurrer is sustained, and the complaint is dismissed.

As this case has gone off on the demurrer, a copy of the complaint is filed as an exhibit to the opinion.

[438] **PRESCOTT & A. C. R. CO. v. ATCHISON, T. & S. F. R. CO. ET AL.***

(Circuit Court, S. D. New York. January 8, 1896.

[73 Fed., 438.]

PLEADING—INTERPRETATION OF COMPLAINT—DEMURRER.—A complaint is to be interpreted as a whole even on demurrer and on motion to dismiss.^b

RAILROAD COMPANIES—ARRANGEMENTS FOR THROUGH BILLING.—There is no principle of common law which forbids a single railroad corporation, or two or more of such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the interstate commerce law. *New York & N. Ry. Co. v. New York & N. E. R. Co.*, 50 Fed. 867, explained.

CONTRACTS IN RESTRAINT OF TRADE—ACT JULY 2, 1890.—A contract by which a railroad company arranges with another, to the exclusion of still others, for the interchange of passengers and freight by through tickets and bills of lading, is not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890.

This was an action by the Prescott & Arizona Central Railroad Company against the Atchison, Topeka & Santa Fé Railroad Company and other railroad corporations and individuals for alleged unlawful discrimination in refusing to accept freight from the plaintiff company, on through bills of lading, while such freight was accepted and carried on through bills, under a contract with other railroad companies. The case was heard upon a motion, by all of the

* Appeal to Circuit Court of Appeals, Second Circuit, dismissed because not sued out within six months after entry of original judgment (84 Fed., 213). Not reprinted. Merely a matter of practice.

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defendants save one, to direct a verdict in their favor upon the pleadings and opening, the remaining defendant asking judgment in his favor on demurrer.

O. N. Sterry, for the motion.

Delos McCurdy, opposed.

LACOMBE, Circuit Judge (orally).

In this case I have examined the authorities submitted yesterday by the parties on both sides, and have reached the conclusion that the motions to dismiss must be granted. I am unable, however, in so brief a time to formulate any elaborate opinion; and it will be sufficient to indicate that the lines of thought which lead to this conclusion may be ascertained by reference to the cases of *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58, *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, and the *Dueber Watch-Case Co. Case*, 14 C. C. A. 14, 66 Fed. 637; all three being opinions of circuit courts of appeals.

All legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the persons with whom he shall do business, should be cautiously construed. It is legislation of a novel character, and should not be extended beyond the plain import of the language used by the lawmakers. Stripped of the adjectives and of the averments as to conclusions of law, the gist of this complaint is the making of the particular contract known as "Exhibit A," and [439] the carrying out of that contract according to its terms, coupled with the further set of facts that, in carrying out that contract according to its terms, the parties thereto necessarily ceased to continue with the plaintiff corporation the relations which had existed before. That contract contemplates, and the acts of the parties defendant set forth in the complaint show, that what was done was to institute a system of interchange of freight and interchange of passengers by the new corporation to and with the other four defendant corporations, and to cease, from and after the execution of that contract or some subsequent date, the further

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interchange of freight and passengers on through bills, and by through tickets, with the plaintiff corporation. Now, it is true that the complaint contains a single clause, at the close of the sixty-ninth paragraph, which uses the words "by utterly refusing to receive or deliver freight or passengers to or from it." That language, taken in its full scope, imports a refusal to receive freight, that had its origin on the line of the Prescott & Arizona Central Railroad Company, wherever and under whatever circumstances it was tendered. But it is a fair rule of pleading that the complaint is to be interpreted, even upon demurrer and upon motion to dismiss, as a whole; and examining it a second time, after the arguments yesterday, with great care, I am constrained to the conclusion that the case which it makes out is the case stated in general terms in the sixty-ninth paragraph, but set forth specifically and distinctly in the seventy-eighth paragraph, namely, "that the defendants have refused to accept or deliver local and interstate freight at said Seligman [or Prescott Junction] upon through billing from or to the line of the plaintiff, in conjunction with the lines of said defendants, although the said defendants now accept and deliver freight upon through billing from or to the said defendant the Santa Fé, Prescott & Phoenix." And the illustrative cases which are given under another of the paragraphs, the seventy-first, indicate quite clearly that the ground of complaint and the case made by the bill is the refusal to deliver freight on through bills, and without breaking bulk, to the plaintiff corporation, or to receive freight from the plaintiff corporation without breaking bulk, and without rebilling, and the same with regard to passengers,—the refusal to send passengers on through tickets, or to accept through tickets with passengers.

Now, I know of no principle of common law which forbids an individual railroad corporation, or two or three or more corporations, from selecting as to which one or two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk. And I do not find

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in the interstate commerce law sufficient to warrant the conclusion that the law has been changed in that particular. This court, sitting in May, 1892, at a term where the present judge sat, reached a somewhat different conclusion in *New York & N. Ry. Co. v. New York & N. E. R. Co.*, 50 Fed. 867. Of that case it is to be said that the decision was to some extent induced by the way [440] in which the case came to the court, after action by the interstate commerce commission, already partially accepted by both sides; and, moreover, there had not been at that time so exhaustive a judicial examination and exposition of the terms of the interstate commerce law as we now find in the authorities, notably in the decisions of circuit courts of appeals. The conclusion is reached, therefore, that this was not a contract in unlawful restraint of trade, within the meaning of the act of July 2, 1890, for the reason that it was not so at common law, was not made so by the interstate commerce statute, and that the act of 1890, as indicated in the *Dueber Watch-Case Co. Case* and in the *Trans-Missouri Case* (which have been already cited), is directed solely against contracts which would have been unlawful before the passage of the act.

The further question as to whether the averments of the complaint are sufficient, assuming that the court be in error on this branch of the case, to make out a cause of action against the individual directors, need not be considered. The authorities cited by the defendants are very strongly in support of their motion; but the court prefers to put the decision in this case upon the broader ground.

The motions, therefore, to dismiss as to John J. McCook individually, as to the same as receiver of the Atchison, Topeka & Santa Fé, as to the same as receiver of the Atlantic & Pacific, as to the same as trustee of the Prescott & Arizona Central Railroad Company, as to Russell Sage, as to Cecil Baring, both individually, as to McCook and Crane, as executors of George C. Magoun, and as to John J. McCook, as director of one or more of the railroads named, are granted; and the demurrer of George J. Gould to the bill, on the ground that it does not set forth facts sufficient to constitute a cause of action, is sustained. Judgment is therefore directed in favor of the moving parties for dismissal of the

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complaint, and the ordinary form of order on demurrer will be signed when presented. An exception is granted as to the whole disposition of the case, and exceptions separately as to each one of the separate motions will be recorded. Stay of 30 days to plaintiff.

[236] NATIONAL HARROW CO. *v.* QUICK ET AL.

(Circuit Court of Appeals, seventh circuit. May 4, 1896.)¹

[74 Fed., 236.]

[Decree of the Circuit Court (67 Fed., 130) dismissing the bill for want of equity affirmed, but not upon any ground having a bearing upon the antitrust law. Patent in question held to be void.]

[802] THE CHARLES E. WISEWALL.*

(District Court, N. D. New York. June 12, 1896.)

[74 Fed., 802.]

MONOPOLIES—ACT JULY 2, 1890—TOWAGE SERVICES.—One who requests and accepts the services of a tug for towage purposes cannot escape paying the reasonable value of the services rendered, on the ground that the tug owners are members of an association which is illegal under the act of July 2, 1890, relating to trusts and monopolies.¹

This was a libel in rem by certain tug owners against the steam dredge Charles E. Wisewall to recover the value of certain services rendered by their tugs in towing the dredge. On final hearing.

Joseph A. Lawson and Isaac N. Lawson, for libelants.

W. Frothingham, for claimant.

* Decree affirmed by Circuit Court of Appeals, Second Circuit, March 2, 1898 (86 Fed., 671). See p. 850, where the case is entitled "The Charles E. Wiswall."

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COXE, District Judge (orally).

The proof shows conclusively that during the summer of 1895, the tugs mentioned in the libel, rendered services to the claimant's dredge in sums aggregating several hundred dollars. The claimant seeks to avoid payment for the services thus requested and accepted by him, upon the ground that the tug owners were members of an association which was illegal and void under the act of July 2, 1890. The courts have found it very difficult to apply the indefinite generalities of this act to the facts of any given case. *Prescott & A. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 73 Fed. 438, and cases cited. Assuming, however, in order to avoid argument, that the agreement by which the tugs undertook to act in unison was prohibited by the act, as being in restraint of trade, my present impression is that this assumption will not aid the claimant. He should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. Counsel for the claimant asked for additional time in which to present authorities to establish the proposition that the towage contracts were void and in restraint of trade because the agreement by which the tugs were associated was void for that reason. The au- [803] thorities furnished fail, in my judgment, to meet the point in question. It is a mistake to confound the two contracts. An agreement by the tug *Mayflower* to tow the dredge *Wisewall*, for a reasonable sum, from Albany to Troy, is not void because the *Mayflower* is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop he would find it difficult to avoid paying their actual market value because the vendor and other tailors of that city had combined to keep up prices. So when he employs the Albany tugs during an entire season and receives services worth, upon the present proof, over \$900, he should not be permitted to disavow his just obligations upon a pretext so illogical. The tugs do not ask that the dredge shall pay any more than their services are actually

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worth. If they are worth less than \$924 demanded in the libel, it is still open for the claimant to show it. But it is unnecessary to pursue the subject further. Above and beyond every other consideration stands the indisputable fact that the tugs rendered valuable services to the dredge at her request. These debts she should pay. To permit her to escape would be aiding a scheme of repudiation. The tugs are entitled to a decree. Unless there is a reasonable prospect that the claimant can produce testimony reducing the amount proved to be due, a reference would seem unnecessary. However, if the claimant desires it a reference will be ordered. The libelants may amend the libel in the respects heretofore suggested if on reflection they desire to do so.

[667] NATIONAL HARROW CO. v. HENCH ET AL.*

(Circuit Court, E. D. Pennsylvania. August 25, 1896.)

[76 Fed., 667.]

MONOPOLIES—COMBINATION OF PATENT OWNERS.—A combination among manufacturers of spring-tooth harrows, by which each manufacturer assigns to a corporation organized for the purpose the patents under which he is operating, and takes back an exclusive license to make and sell the same style of harrows previously made by him, and no other, all the parties being bound to sell at uniform prices, held to be an unlawful combination for the enhancement of prices, and in restraint of trade.^b

Risley, Robinson & Love, for complainant.

Strawbridge & Taylor and *John G. Johnson*, for defendants.

ACHESON, Circuit Judge.

The plaintiff, the National Harrow Company, seeks an injunction restraining the defendants, Hench & Dromgold, from selling float spring-tooth harrows, harrow frames, and attachments applicable thereto, upon more favorable terms

*Affirmed by Circuit Court of Appeals, Third Circuit (83 Fed., 36). See p. 742. A similarly entitled case (84 Fed., 226), p. 746, is another suit, brought in the Circuit Court, N. D. of New York.

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as to price to purchasers thereof than the prices stipulated in two license contracts annexed to the bill, and a decree for the specific enforcement of said contracts, and for an accounting at the rate of five dollars for each harrow, etc., sold in violation of the terms of said license contracts.

Several defenses are insisted on, but in the view I take of the case it will be necessary to discuss only one of them, namely, that these license contracts are in unreasonable restraint of trade, and are part of an unlawful combination to control the manufacture of an important article of commerce, to destroy competition in the [668] sale thereof, and maintain high prices. The National Harrow Company, a corporation of the state of New York,—to whose contract rights and general purposes the plaintiff, a subsequently created New Jersey corporation, has succeeded,—originated in a written agreement between a number of leading and distinct manufacturers, under various United States letters patent of float spring-tooth harrows, whereby it was agreed that they should organize a corporation under the laws of New York, and would assign to the corporation all United States letters patent which they respectively then owned or should thereafter acquire relating to float spring-tooth harrows, and the good will of their business in such harrows, and that they would not thereafter be interested in the manufacture or sale of such harrows, except as agents or licensees of the corporation; that the corporation should issue to the persons, firms, and corporations, respectively, so assigning to it their said patents and the good will of their business, exclusive licenses to manufacture and sell upon their own account, subject to uniform terms and conditions, the same style of harrows which they were making and selling just prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by its licenses; that each licensee should pay to the corporation one dollar on every float spring-tooth harrow manufactured and sold by such licensee, and that each person, firm, or corporation transferring to the corporation the good will of their float spring-tooth harrow business, and their patents relating thereto, should receive in payment therefor the value thereof as agreed upon or as fixed by arbitration in paid-up stock of

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the corporation. The agreement in the first instance was signed by six different manufacturers, but the contract contemplated and provided that others should come into the arrangement and become parties thereto. Accordingly, other manufacturers of float spring-tooth harrows soon joined the combination, which then embraced 22 different persons, firms, or corporations. Thus, almost the entire output of float spring-tooth harrows made in the United States was brought under the regulation and control of this organization, its licensees manufacturing and selling at least 90 per cent. thereof.

The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style of harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license on terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers [669] than as is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market, except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation one dollar upon each float spring-tooth harrow, etc., manufactured and sold by them agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license,

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and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions.

It will be perceived that the corporation through whose instrumentality the purposes of the combination are effected is simply clothed with the legal title to the assigned patents, while the several assignors are invested with the exclusive right to manufacture and sell their old style of harrows under their own patents; but all of them must sell at uniform prices and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other style or kind of float spring-tooth harrow than they are thus licensed to make and sell. Now, it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained. On the contrary, the courts have repeatedly adjudged combinations between a number of persons engaged in the same general business to prevent competition among themselves, and maintain prices, to be against sound public policy, and therefore illegal. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 530; *Mers Capsule Co. v. United States Capsule Co.*, 67 Fed. 414; *Nester v. Brewing Co.*, 161 Pa. St. 478, 29 Atl. 102.

I am not able to concur in the view that the principle of these cases is inapplicable here, because the agreement in question involves patents. It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of inde-

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pendent manufacturing concerns are engaged in making and selling, under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby the public interest is pro- [670] moted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade, and destroys competition, is as injurious to the community, and as obnoxious to sound public policy, as if the confederates were dealing in unpatented articles. To the present case may well be applied the remarks of the supreme court of Pennsylvania in *Morris Run Coal Co. v. Barclay Coal Co.*, *supra*: "This combination has a power in its confederated form which no individual action can confer." By the united action of more than a score of different manufacturers, natural and salutary competition is destroyed. To sanction such a result, because accomplished by a combination of patentees, would be, I think, to pervert the patent laws. Moreover, it is to be noted that under these license contracts the licensees can only make or sell their own specific form of harrow. All other forms, whether patented or unpatented, are prohibited to them. For this interdiction there is no justification. In the case of *Harrow Co. v. Quick*, 76 O. G. 1574, 67 Fed. 130, Judge Baker expressed the opinion that this combination was unlawful, and against sound public policy. I am constrained to regard the license contracts sued on as part of an illegal combination, and in unwarrantable restraint of trade. I must, therefore, deny the plaintiff the relief sought. The other defenses I need not consider.

The matter of the cross bill was not much noticed by counsel, if discussed at all. My conclusion is that the plaintiffs therein have not shown themselves to be entitled to affirmative relief. They entered into this combination voluntarily. The preliminary agreement does not remain executory in any particular. These cross plaintiffs do not owe any duty or service to the public, the performance of which is hindered by an improvident and unlawful contract. No special ground for equitable relief is disclosed by the cross bill, and the plaintiffs therein do not require a decree of cancellation in order to defend against suits based upon the license con-

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tracts. The cross bill will be dismissed, without prejudice to the right of the plaintiffs therein to defend against suits, or their right to maintain a bill should circumstances or exigencies arise to justify equitable interposition.

Let a decree be drawn in conformity with the views expressed in the foregoing opinion.

[895] UNITED STATES v. JOINT TRAFFIC
ASS'N.*

(Circuit Court, S. D. New York. May 28, 1896.)

[76 Fed., 895.]

RAILROADS—JOINT TRAFFIC ASSOCIATIONS—INTERSTATE COMMERCE LAW.—A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get, over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling of traffic on freights, or division of net proceeds of earnings, within the prohibitions of the interstate commerce law, nor of the act of 1890 (26 Stat. 209) against unlawful restraints and monopolies.^b

SAME—JURISDICTION OF FEDERAL COURTS.—The United States cannot maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the interstate commerce law, when it appears that it did not grant the charter of, and has no proprietary interest in, any of the roads. Its right is to prosecute for breaches of the law, not to provide remedies.

This was a bill in equity, filed by the United States against the Joint Traffic Association to enjoin alleged violations of the interstate commerce law.

Wallace Macfarlane, United States Attorney.

James C. Carter and *Edward J. Phelps* (*George F. Edmunds*, on brief), for defendants.

* Affirmed by Circuit Court of Appeals, Second Circuit (80 Fed., 1020). Memorandum decision. See p. 869. Reversed by Supreme Court United States (171 U. S., 505). See p. 869.

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WHEELER, District Judge.

The interstate commerce law (24 Stat. 379) provides:

"Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any [898] case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence."

The act of 1890 against unlawful restraints and monopolies (26 Stat. 209) provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared illegal."

The 32 railroad companies defendants, immensely engaged in competitive interstate commerce, have made an arrangement forming this Joint Traffic Association, with a board of nine managers, consisting of one each from the Baltimore & Ohio, Chesapeake & Ohio, Erie, Grand Trunk, Lackawanna, Lehigh Valley, Pennsylvania, Vanderbilt, and Wabash systems; and with jurisdiction over competitive traffic which passes to, from, or through the western termini of the trunk lines, viz. Toronto, Can., Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk and Salamanca, N. Y.; Erie, Pittsburgh, and Allegheny, Pa.; Bellaire, O.; Wheeling, Parkersburg, Charleston, and Kenova, W. Va.; and Ashland, Ky.; and such other points as may hereafter be designated by the managers as such termini. The arrangement provides as to rates, fares, charges, and rules (article 7):

"Section 1. The duly-published schedules of rates, fares, and charges, and the rules applicable thereto, now in force, and authorized by the companies parties hereto, upon the traffic covered by this agreement (and filed with the interstate commerce commission as to such of said traffic as is interstate), are hereby reaffirmed by the companies composing the association; and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto.

"Sec. 2. The managers shall, from time to time, recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement, and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement.

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No company party hereto shall, through any of its officers or agents, deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved, except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.

"Sec. 3. The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the interstate commerce act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall co-operate with the interstate commerce commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

It also provides, as to competitive traffic (article 8) :

"The managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done; and the control of all persons acting as contracting and soliciting freight and passenger agents in relation to [897] the traffic covered with due regard to the relative interests involved, and the number of such persons to be employed, is given to the managers."

This bill is brought at the request of the interstate commerce commission, under the direction of the attorney general, by the district attorney of the United States for this district, against this agreement, as made, without counting upon any statutes, or alleging anything actually done under it to be of itself unlawful otherwise than because so done. The answer denies, as a conclusion, any illegality within or under the agreement; and, as a matter of fact, anything unlawful outside of or beyond it. The case has been heard upon the bill and answer, and so is made to turn upon the question of the legality or illegality of the contract, and upon the right of the United States, as plaintiff, to maintain this suit, if it is illegal. The provisions of the contract stated are understood to be the ones challenged as being contrary to the statutes quoted.

The restraint and monopoly act expressly authorizes such a proceeding in equity as this to prevent its violation, and this suit is well maintained if this contract is within it. Railroads are not expressly named in this act, and are said in argument not to be within its terms. No one is so named;

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but it applies to all contracts and combinations in restraint of trade or commerce among the states. Railroads do not trade among the states, but they carry for those who do; and what would restrain their so carrying would seem to be a restraint of such commerce.

These provisions of the contract do not provide for lessening the number of carriers; nor their facilities; nor for raising their rates, except expressly by its terms not contrary to law, and therefore not beyond what are reasonable. The interstate commerce law (section 1) requires all rates to be reasonable, and the making of reasonable and lawful rates upon carriage in any traffic cannot be any restraint in law upon such traffic. *U. S. v. Trans-Missouri Freight Ass'n*, 53 Fed. 440; *Id.*, 7 C. C. A. 15, 58 Fed. 58. The soliciting of custom is no part of the duty of common carriers, and dispensing with soliciting agents, or with the control of them, cannot be illegal, nor an agreement to do so be an illegal contract. As this case rests wholly upon the contract as made, and not upon anything actually done under color of or beyond it, and each road is left by it to carry on its own business within lawful limits as before, no unlawful restraint of commerce seems to be provided for by it; and no ground for relief under that statute of 1890 is made out.

No provision is made by the interstate commerce law for enforcing its provisions in equity, except to carry out orders of the commission; and authority for this suit to restrain any violation of that law must appear otherwise, or fail. That governments and states exercising general municipal control over the people, their property, their rights and their convenience, may, by their law officers, maintain suits in equity to restrain actual nuisances to ways, parks, commons, and the like, which are injurious to the common rights of all to their enjoyment, is not to be questioned. The United States government is limited in such control to such particular subjects as are committed to it, which include, of course, interstate and foreign commerce, car- [898] rying the mails, and such. These railroads are not federal instruments, although they may be, and probably are, engaged in the business of, and are within control of the laws of, the government to some extent. As so engaged, no nuisance would be

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federal till it should become actual by obstructing these functions. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. This contract, if illegal, is intangible, and is not alleged or claimed to have obstructed the roads for government purposes in any manner whatever.

The United States may maintain a bill in equity to repeal a patent for land (*U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850), or a patent for an invention (*U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90); and a state to protect its interest in components of the soil under its navigable waters (*Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689), or to prevent abuse of charters granted by it (*Attorney General v. Railroad Companies*, 35 Wis. 524), because of the interest in the property as proprietor, or in the grant as a party to it. But here the United States are not alleged, or understood, to have granted the charters of, or to have any proprietary interest in, any of these railroads; or to have any other concern about them in any respect involved here, but to have its prohibitory statutes for regulating commerce between the states respected and obeyed, the same as those against counterfeiting, or tampering with the mails, should be. Breaches of such statutes are misdemeanors punishable by indictment or information, and that merely such are not preventable in equity is elementary. A plaintiff in equity for relief by injunction should have some right or interest in the subject of prevention, or be given express authority to proceed in that way by statute. Authority is given to the interstate commerce commission to have proceedings for the enforcement of that law taken and prosecuted, but that is understood to refer to the usual and appropriate proceedings in such cases, and seems not to authorize any that were unknown before. The right given here to that commission is to prosecute rights, but not to provide remedies. If this is erroneous, only such agreements are prohibited as are for the pooling of freights, or dividing aggregate or net proceeds of earnings. So far as this agreement goes, each road carries the freights it may get, over its own line, at its own rates, however fixed, and has the proceeds, net or other, of the earnings to itself. Very able judicial opinions and learned commentaries and

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disquisitions upon pooling, too numerous for separate notice herein, have been referred to, but none make it include what is left in wholly separate channels. Provision for reasonable, although equal or proportional, rates for each carrier, or for a just and proportional rate for each carrier, or for a just and proportional division of traffic among carriers, does not seem to be either a pooling of their traffic or freights, or a division of the net proceeds of their earnings, in any sense.

This statement of reasons seems quite inadequate to the very full and able argument upon which this case has on each side been presented, but these conclusions have been reached upon full consideration of all, so far as understood; and, as they appear to be sufficient for the disposition of the case, no more is attempted. Bill dismissed.

[1] GREER, MILLS & CO. v. STOLLER ET AL.

(Circuit Court, W. D. Missouri, W. D. November 6, 1896.)

[77 Fed., 1.]

FEDERAL COURTS—JURISDICTION—NONRESIDENTS OF DISTRICT—MONOPOLIES.—A bill by members of a business exchange to enjoin the board of directors from enforcing against them certain by-laws of the association on the ground that the same are illegal, as being in restraint of trade and commerce, cannot be based upon the "Anti-Trust Law" of July 2, 1890 (26 Stat. 209); for the right given by section 4 thereof to bring suits for injunction is limited to suits instituted on behalf of the government. Therefore the authority given by section 5, to bring in nonresidents of the district, cannot be availed of in private suits, and the court can acquire no jurisdiction over them.*

PARTIES TO ACTIONS—DIRECTORS OF UNINCORPORATED ASSOCIATIONS.—All the directors of an unincorporated association are necessary parties to a suit against it arising out of contractual relations, even though a less number are authorized by the association to transact business.

VOLUNTARY ASSOCIATIONS—SUSPENSION OF MEMBERS.—Where a member of a voluntary association has been suspended by the directors for nonpayment of a fine for violation of the by-laws, his action to be restored to the privileges of membership is founded upon the contract between himself and the association, which he must either accept in its entirety or repudiate. He does not occupy the position of a stranger injured by the acts of co-trespassers.

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Statement of the Case.

This is a bill in equity seeking to enjoin the defendants from doing certain specified acts. The complainant is a non-resident of the state. The respondents constitute the board of directors of the Kansas City Live-Stock Exchange, a voluntary business association of this district.

The general objects of this association, as declared in its articles of association, are "for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business." By subscribing thereto, the members agreed with each other to faithfully observe and be bound by the rules and by-laws of the association. The complainant became a member thereof, and participated in the proceedings and business of the association for a [2] long time prior to the institution of this suit. For an alleged violation of the by-laws of the association it was, in accordance with the provisions of such by-laws, tried by the governing board of the association, and, being by them found guilty, was sentenced to pay a fine of \$1,000, and suspended until the said fine should be paid. Refusing to comply therewith, the board of directors, as authorized by the by-laws of the association, sought, by giving public notice thereof on the billboards of the association and otherwise, to induce the members of the association to cease to do business with the complainant as a member of the association, and to obstruct its business operation as a member of the association, by denying it the privilege of members in selling stock on commission through the exchange. Thereupon it brought this bill in equity, setting out in detail its grievances, alleging that the by-laws thus sought to be enforced against it are illegal, being in restraint of trade and commerce, and tending to create a monopoly by the said board in the live-stock business at said stock yards, and charging the defendants with attempting to enforce against it what is termed a "boycott." The bill alleges that the complainant gave notice to the board of the withdrawal of its assent hitherto given to the by-laws complained of; and it asks to have the respondents enjoined from further attempting to enforce said by-laws and said penalty and order of suspension against it, and from further interfering with the business as a member of the said association or otherwise, and from publishing such notices or otherwise of the fact of said suspension, and from requiring other members of the association to cease to do business as such with the complainant, and for general relief. The bill discloses that the association is composed of about 300 members, the price of membership at this time being \$1,000; and that the defendants constitute the board of directors of the association; all of which board are resident citizens of this district, except the respondent Hanna, who is a citizen of the state of Kansas. Hanna has filed a motion to be discharged herefrom for want of jurisdiction over him, while the other defendants move to dissolve the temporary injunction granted heretofore herein, for the reason, *inter alia*, that because of the want of jurisdiction over said Hanna all the necessary parties are not before the court to authorize it to proceed to final decree. Other essential facts appear in the following opinion.

Mills, Smith & Hobbs, Lathrop, Morrow, Fox & Moore,
and *Albert H. Horton*, for complainant.

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Hutchings & Keplinger, McGrew, Watson & Watson, and Karnes, Holmes & Krauthoff, for defendants.

PHILIPS, District Judge (after stating the facts).

The defendant Hanna being a nonresident of the state, this court can acquire no jurisdiction over him against his consent, unless it can be maintained that this action is predicable of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the fifth section of this act, the court, whenever the ends of justice require it, may bring before it other parties by summons, "whether they reside in the district in which the court is held or not." Can a private citizen, for a redress of a private grievance, maintain a bill in equity for an injunction under this act? The things forbidden by the act are declared to be criminal offenses against the government of the United States. By the fourth section, the jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain the violations of this act, "and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations; such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined [3] or otherwise prohibited." Section 7 gives to the private person "injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by this act," a right to sue in a circuit court of the United States in the district in which the defendant resides or is found for threefold damages by him sustained. The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others. *Suth. St. Const.* §§ 392-394, 399; *Riddick v. Governor*, 1 Mo. 147; *Stafford v. Ingersol*, 3 Hill, 38; *Ohandler v. Hanna*, 73 Ala., 390. While there has been some contrariety of opinion among

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judges as to whether or not the right of injunction to a private citizen is accorded by this statute, my conclusion is that the right is limited by the fourth section to injunction at the relation of the district attorney, and that the seventh section gives to the private citizen his only remedy. *Blindell v. Hagan*, 54 Fed. 40, 41; *Id.*, 6 C. C. A. 86, 56 Fed. 696; *Pidcock v. Harrington*, 64 Fed. 821. Therefore Hanna has a right to insist that he cannot be sued in this jurisdiction. *In re Keasbey & Mattison Co.*, 16 Sup. Ct. 273-275. The motion to dismiss on behalf of the defendant Hanna is therefore sustained on the ground of his non-residence.

The question, then, occurs, can this suit proceed without his presence as a party? In other words, is he a necessary party? The Kansas City Live-Stock Exchange is an unincorporated voluntary association composed of about 300 members. Such associations of individuals, in respect of their rights and liabilities, are generally regarded as mere partnerships. Dicey, in his work on Parties, says:

"An unincorporated company is fundamentally a large partnership, from which it differs mainly in the following particulars, viz.: that it is not bound by the acts of the individual partners, but only by those of its directors or managers; that shares in it are transferable; and that it is not dissolved by the retirement, death, bankruptcy, etc., of its individual members." Page 149.

As said in *Phipps v. Jones*, 59 Am. Dec. 711:

"Suits by and against such associations cannot at common law be brought and maintained in the name of the association, or in the name of its agents or trustees. *Ourd v. Wallace*, 83 Am. Dec. 85; *Schuetzen Bund v. Agitations Verein*, 44 Mich. 313, 6 N. W. 675. But actions must be brought and maintained in the names of all the members. * * * On the ground that they have a common interest, members of a voluntary unincorporated association are entitled to join in a suit in regard to matters pertaining to or affecting such interest. *Mears v. Moulton*, 30 Md. 142."

The individual members of such associations retain all their original autonomy, except in so far as they may, by consent to the articles of association, have surrendered such right. In the absence of such assent, not even a majority of the associates could bind the individual member. His judgment would remain independent. A proceeding, therefore, to control the action of and bind the associates, must be directed against the whole membership. But where, as

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in this instance, the executive administra- [4] tion of the business affairs of the association is by articles of agreement committed to a designated board of less number than the whole, it may be conceded that a judicial proceeding against the association may be maintained by summons against such board.

Rule 1 of the association, referred to in the bill of complaint, vests the government of the exchange in a board of 11 directors, composed of the president and vice president of the association, 7 members of which shall constitute a quorum for the transaction of business. Unquestionably, but for the provision clothing the number 7 with the functions of government, it would require the presence and co-operation of the whole 11 to transact any business. But this 7 must not only be present, assembled as a board, to perform any official act (*Hay-Press Co. v. Devol*, 72 Fed. loc. cit. 721, 722), but they are clothed with the functions of acting for and representing the board only for the transaction of business of the association, and not for any other purpose. It does not authorize affirmative action against the association by notice to seven of the directors. As to third persons moving against the association to bind the constituent members, notice must be given to all. As said in *People v. Batchelor*, 22 N. Y. 184:

"It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legal without notice to all the members composing such body."

See, also, 1 Mor. Priv. Corp. (2d Ed.) §§ 479-532.

In *McGreary v. Chandler*, 58 Me. 538, which was an action served on a portion of the directors of a voluntary association, the court said:

"The Machias Mining Company is a voluntary association of individuals, and not a corporation under the laws of the state. The defendants are members, and assume to act as its directors, and as such to bind the association. If they have bound the association, as they purport to have done, all its members are bound by and liable upon their contracts. A suit in such case would be against all the members. In the present case it is against three of the associates only."

The question under consideration was passed upon in *Wall v. Thomas*, 41 Fed. 620. The suit was by a member of an unincorporated association, whose management was intrusted

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to nine trustees. The bill charged the trustees with mismanagement of the affairs of the association, and asked for an injunction. Only four of the trustees were summoned, presumably because the others were nonresidents of the district. It is true, the defendants summoned were less than a majority of the trustees, but the logic of the ruling was that all of the trustees were necessary parties, and therefore the bill could not be entertained. The court said:

"If the defendants are enjoined, their co-trustees will to that extent be crippled, and may be wholly prevented from doing what they propose. What is proposed to be done may be lawful and authorized, and, indeed, essential to the protection of the great interests with the management of which the trustees are charged. It is not enough that, according to the averments of the bill, these things are unauthorized, and a breach of trust, because the absent trustees have the right to be heard before these averments are taken as true against them. And they cannot be assumed to be true as the basis for a decree until all those who have a right to challenge them have been given an opportunity to do so. A contrary rule would put it in the power of a minority of unfaithful trustees, by collusion [5] with a beneficiary whose interests might not lie with those of other beneficiaries, to defeat the performance of legitimate and exigent official duties by faithful trustees."

The logic of the opinion clearly shows that it is just as incompetent to undertake to bind the body of trustees by a proceeding against six as it would be against three, for the learned judge says:

"Succinctly stated, the court is called upon to adjudge not only that the defendants have abused their trust, but also that the absent trustees have done so, and to decree that what the absent trustees propose to do is unauthorized and unlawful. While the absent trustees would not be bound by such a decree, it could not be made without embarrassing, and perhaps defeating, their contemplated action, because it would deprive them of the co-operation of their co-trustees."

The court then proceeds to argue that, if the injunction would prevent the absent trustees from taking any action, it should not be granted without giving such absent party an opportunity to be heard; and that such a suit would be an attempt by indirection "to control the management of a trust fund without giving some of those who are charged with the duty of managing it a right to be heard."

This is a wholesome rule. As applied to business corporations whose management by charter is committed to a board of directors, the courts, with unyielding decision, have required that all acts of such trustees affecting the property

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of the corporation, and all acts of an administrative character should be performed by them when assembled as a board, so that their action should be a unit, and the result of deliberation with that mutual interdependence of judgment which comes from consultation one with another. *Cammeyer v. Lutheran Churches*, 2 Sandf. Ch. 208-229; *State v. Ancker*, 2 Rich. Law, 245; *Hay-Press Co. v. Devol*, 72 Fed. 717; *Hill v. Mining Co.*, 119 Mo. 9-24, 24 S. W. 223. If a suitor may proceed against less than the whole number of trustees to bind the association, against how many and which of the number? Shall he select them? He might omit those from the summons whose wise counsel and staid judgment would be most valuable and reliant to the body in defending in court. While section 739, Rev. St. U. S., declares that, where there are several defendants in any suit at law or in equity, and any number of them are not inhabitants of nor found in the district where suit is brought, and do not voluntarily appear, the court may proceed to adjudication, yet it is the recognized construction of this statute that it has reference only to instances of mere formal parties, or where the cause may be determined, and justice satisfied, "without essentially affecting the interests of absent parties"; as where the interests of the parties absent are separable from those before the court. But where persons have not only an interest in the controversy, but such an interest that a final decree would affect it, or leave the controversy to be fought over in subdivisions, in order to conclude the rights and measure out the equities of all, they are indispensable parties to the exercise of jurisdiction. *Shields v. Barrow*, 17 How. 130; *Wall v. Thomas*, supra. The defendant Hanna, both as trustee and member of the association, has a direct personal interest in and important official relation to the management and [6] property of this association. There is not only committed to his keeping, by the rules of the association, the responsible duty of assisting and managing its affairs, but in the custody and management of the \$12,000 of assets which the bill alleges to be now in the treasury of the association, as also in the management and disposition of the \$1,000 fine assessed against the complainant, the collection or enforcement of which the bill seeks to enjoin.

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And as a member of the board of business managers he is entitled to a voice in deciding whether or not the board shall resist or accede to complainant's demand. To enable the complainant, therefore, to proceed to judgment against the segment of the managing board of trustees before the court, it must be held that the suit, in its legal effect, presents the instance of an action *ex delicto* by a party wrongfully injured in his property rights by the tortious acts of several persons, in which case the injured party may proceed jointly or severally against the tort feorsors for satisfaction. *Boyd v. Gill*, 19 Fed. loc. cit. 145.

This brings us to a consideration of the character of the case presented on the face of the bill, around which is centered the real battle between the contending parties. What is the real gravamen of the bill? Do the facts alleged constitutive of the cause of action depend upon a contractual relation between the complainant and the association, or does it occupy the attitude of a stranger injured by the act of co-trespassers? If the cause of action is dependent upon a contract between the parties sustaining *inter sese* the relation of co-partners, the rule of equitable procedure seems to be well established that all the partners, or at least all the board of trustees, representing the association, must be made parties. The bill alleges the existence of a voluntary business association, and sets out or refers to in appropriate form the articles of association and its by-laws. It appears that the complainant became voluntarily a member thereof, and subscribed to the articles of agreement, and thereby became entitled to share in and enjoy the privileges, rights, and benefits of the business organization. Reduced to its actual essence, the complaint is that, although the complainant, in becoming a member of the association, agreed that its board of managers, for any infraction of the established rules of business ethics, might, in its discretion, visit upon the offending member a fine, to be enforced, if not paid, by suspension and expulsion, with a further disability of being refused by other members of the association recognition in their dealings as live-stock commission men, so that, so far as they are concerned, he would be proscribed in the dealings of the association,—it then complains that, by reason of the visitation

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upon it of the penalty of these regulations, it is barred the privileges and benefits accruing to a member of the association. It complains that it is practically prevented from collecting its commissions on live stock sold at the stock yards, which are secured to it by the articles of association. And among the grievances complained of it is alleged that a fine was imposed upon it by the board of directors for a violation of the rules and regulations of the association, and that an order of sus- [7] pension was made and published; and that among its regulations is one providing that no hogs can be sold on the exchange unless the same have been "docked,"—that is, an estimate made by the inspectors of the association designated therefor as to the average weight of the hogs,—and that by reason of the refusal of the managing board to have hogs consigned to it for sale "docked" it is unable to make sales thereof on the exchange; whereby, in connection with other efforts of the board to visit upon it the penalty of disbarment, a practical "boycott" is put in force against it. The bill then alleges that so much of the by-laws as authorizes the board to impose such fine, to suspend and expel the complainant, is contrary to sound public policy, and is in restraint of trade, and tends to give the other members of the association a monopoly of such business at the stock yards in question, and that this complainant, having notified the board of its withdrawal and its assent to such rules and regulations when it became a member, it is now entitled to have the same nullified, and its rights as a member recognized by the board. It thus is quite apparent that the whole predicate of the action has its root in the contract by which complainant became, and yet claims to be, entitled to the rights of a member of this association. In substantive effect it seeks to be restored to all the rights, privileges, and benefits of a membership in the live-stock exchange, the deprivation of which is the sole gravamen of the complaint. The right, for instance, to have the hogs consigned to it for sale on commission "docked," whereby it may be able to sell them on the exchange, is wholly dependent upon its contractual relation to the association. There is no claim in the bill that the "docking" regulation is vicious, as conflicting with any public policy of this state or at common law.

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Neither does the complainant complain that the general articles of the joint association to which it subscribed is contrary to law, or that the limitations in the articles of agreement and by-laws fixing a minimum commission at which any member shall sell live stock shipped to this market, and prohibiting its members from conducting here such business "on the outside," are in restraint of trade, or tend to create a monopoly. So that the complainant occupies in this controversy the anomalous attitude of claiming the privileges and benefits attaching to and ensuing from the association, while denouncing as illegal and inoperative that portion of the articles designed to make the combination effective and obligatory on the associates. It may be conceded that in respect of a certain character of contracts they may be good in part and bad in part, so that the court may enforce that which is valid and reject that which is vicious; but that is not this case. The rights of the complainant being bottomed on its having become a member of the association by subscribing to its articles and its body of by-laws, can it, under such a compact, ask a court of equity to restore it to fellowship, while rejecting a part of the creed of the order? As said by Chief Justice Coleridge in *Steamship Co. v. McGregor*, 21 Q. B. Div. 544: "It is a bargain which persons in the position of the defendants here have a right to make, and those [8] who are parties to the bargain must take it or leave it as a whole."

So, waiving any question of whether or not certain provisions of the articles of agreement and by-laws are contrary to public policy, the fact remains that, had the complainant declined, when it applied for admission into the association, to subscribe to and accept the articles and by-laws as a whole, it would not have been admitted to membership. In such contingency, it would hardly need the citation of authorities to command the assent of the learned counsel representing this complainant to the proposition that no court would issue a mandatory injunction compelling the admission of such an applicant to membership, for the palpable reason that it is entirely a matter of contract, and it takes two parties to make a contract; and courts ought never to undertake to make a contract between two free, responsible persons. It does seem

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to me that this complainant must choose to be either in or out of this association. It cannot be half in and half out. If a member, and the contract of membership be what is sometimes inaptly termed "illegal," but is simply one in contravention of a sound public policy, as said by Lord Justice Bowen in *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, 619, it is one which the courts do "not prohibit the making of," but which they will simply "not enforce." And the converse of the proposition must hold good,—that, if he be outside of such an association, he cannot appeal to a court of equity to reinstate him after expulsion; nor can he base any right of action on the alleged illegal character of part of the articles of association of the exchange or its by-laws (*American Live-Stock Commission Co. v. Chicago Live-Stock Exchange*, 143 Ill. 210, 32 N. E. 274), so long as he insists upon the rights of a member. A member is entitled to the privileges and rights inhering in a membership so long only as he keeps his part of the contract, expressed in his subscribing to the articles and by-laws of the association. 1 Beach, Priv. Corp. §§ 19, 83, 84, 309; Boone, Corp. § 333; *Supreme Lodge v. Wilson*, 14 C. C. A. 264, 66 Fed. 788; *Hammerstein v. Parsons*, 38 Mo. App. 336, 337; *Warren v. Exchange*, 52 Mo. App. 157-167.

It is a general rule of law, applicable to such voluntary associations, that a member must either submit to its rules or surrender his membership. *White v. Brownell*, 2 Daly, 329, 337, 342, 350; *Id.*, 3 Abb. Prac. (N. S.) 318; *Hyde v. Woods*, 2 Sawy. 655-659, Fed. Cas. No. 6,975; *Lafond v. Deems*, 81 N. Y. 507-514; *Weston v. Ives*, 97 N. Y. 222-228; *Lewis v. Wilson*, 121 N. Y. 284-287, 24 N. E. 474; *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. 225; 24 Am. Law Rev. 538. The member has his option to retain his membership by complying with the by-laws, or cease to be a member by refusing a compliance. *Manufacturing Co. v. Hollis* (Minn.) 55 N. W. 1119-1121; *Rorke v. Board* (Cal.) 33 Pac. 881-883.

But, without undertaking to enter upon any discussion as to the legality of this association, and its right to continue its organization and prosecute its business, and accepting the averments of the bill that the relation of the complainant to the association rests upon a mutual contract between the associates, my conclusion is [9] that this court cannot proceed

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to judgment in this action for the want of jurisdiction over all the necessary parties to a full and final determination. Therefore the motion to dissolve the injunction must be sustained. Decree accordingly.

[712] UNITED STATES *v.* ADDYSTON PIPE & STEEL CO. ET AL.*

(Circuit Court, E. D. Tennessee, S. D. February 5, 1897.)

[78 Fed., 712.]

ANTI-TRUST ACT—INTERSTATE COMMERCE.—The act of congress of July 2, 1890, commonly known as the "Anti-Trust Act," does not, and could not constitutionally, affect any monopoly or contract in restraint of trade, unless it interferes directly and substantially with interstate commerce, or commerce with foreign nations.^b

SAME.—Where several corporations engaged in the manufacture of cast-iron pipe formed an association whereby they agreed not to compete with each other in regard to work done or pipe furnished in certain states and territories, and, to make effectual the objects of the association, agreed to charge a bonus upon all work done and pipe furnished within those states and territories, which bonus was to be added to the real market price of the pipe sold by those companies, this combination was not a violation of the anti-trust act, as it affected interstate commerce only incidentally.

SAME.—In the examination of such a contract, fraud and illegality are not to be presumed, but must be proved, as in all other cases.

SAME.—In a suit such as this, in the name of the United States, jurisdiction depends alone upon the act; and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available.

James H. Bible, for complainant.

Brown & Spurlock and *W. E. Spears*, for defendants.

[713] CLARK, District Judge.

This suit is brought on behalf of and in the name of the United States against six named corporations. The state of

* Reversed by Circuit Court of Appeals, Sixth Circuit (85 Fed., 271). See p. 772. Decree modified and affirmed by the Supreme Court (175 U. S., 211). See p. 1009.

^b Syllabus copyrighted, 1897, by West Publishing Co.

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creation and the chief place of business of the several defendants are as follows: Addyston Pipe & Steel Company, Cincinnati, Ohio. Dennis Long & Co., Louisville, Ky. Howard-Harrison Iron Company, Bessemer, Ala. Anniston Pipe & Foundry Company, Anniston, Ala. South Pittsburg Pipe Works, South Pittsburg, Tenn. Chattanooga Pipe & Foundry Works, Chattanooga, Tenn. The petitioner charges that the defendants are practically the only manufacturers of cast-iron pipe within the following states and territories: Alabama, Arizona, California, Colorado, North Dakota, South Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Michigan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma, and Wisconsin. It is further charged upon information that the defendants, in order to monopolize the trade in cast-iron pipe in the above-named states and territories, entered into a contract or association known as the Associated Pipe Works; that the purpose of the association was to destroy all competition within said territory, and to force the public to pay unreasonable prices for the cast iron pipe manufactured and sold by said companies; that for such purposes each company selected a representative; and that these representatives constituted an executive committee. It is charged that the defendants, by the terms of said association, agreed not to compete with each other in regard to work done or pipe furnished in the states and territories above named, and, to make effectual the objects of the association, a bonus was agreed to be charged upon all work done and pipe furnished within said territory, and the petitioner charges that this bonus was put upon the real market price of the pipe sold by these companies, and, to that extent, increased the price to the purchasing public; that the amount of this bonus ranged from \$3 to \$9 per ton; that the purpose of the association was thus to force up the price of cast-iron pipe to an exorbitant and unreasonable extent. It does appear from the bill, as well as the answer and the proof, that upon what may be called "stock goods," regularly sold, there is a fixed bonus, and that

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upon goods supplied by special contract the bonus is determined as follows: When bids are advertised for by any municipal corporation, water company, or gas company, the executive committee determines the price at which the bid is to be put in by some company in the association, and the question to which company this bid shall go is settled by the highest bonus which any one of the companies, as among themselves, will agree to pay or bid for the order. When the amount is thus settled the company to whom the right to bid upon the work is assigned sends in its estimate or bid to the city or company desiring pipe, and the amount thus bid is "protected" by bids from such of the other members of the association as are invited to bid, and by the bidding in all instances being slightly above the one put in by the company to whom the contract is to go. There are within the 36 states and territories what are called "reserved cities," by which it is [714] agreed that particular members of the association shall have the work at particular cities, and on this they pay the regular bonus, just as on stock goods when sold otherwise than by special contract obtained by bidding. It appears, too, that by far the larger part of the work done with goods furnished by these companies is under special contract with municipal corporations and gas and water companies, as above stated. Practically, all the profitable business is thus done. The general public, so far as affected by the business at all, is affected mainly through municipal corporations. All of the states of the United States outside of the states and territories above named are called "free territory," and the states named are distinguished as "pay territory." Settlements are made at stated times of the bonus account debited against each company, where these largely offset each other, so that small sums are in fact paid by any company in balancing accounts.

The aggregate annual manufacturing capacity of the 6 companies belonging to the association is 220,000 tons, with a daily capacity or output of about 650 tons; there are 9 other companies or corporations engaged in the manufacture and sale of cast-iron pipe within the pay territory, with an aggregate daily capacity of about 835 tons, though most of these are small concerns; and there are 10 companies or corpora-

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tions engaged in the same business located within the free territory, as above explained, with a daily capacity or output of, say, 1,550 tons. It appears, also, that members of the Associated Pipe Works, while they do not compete with each other, are subjected to competition by the other companies and corporations, both within and without the pay territory, though just to what extent and with what effect this competition is carried on does not clearly appear. It does appear, however, sufficiently, that the companies within the association have so far not been able to raise or maintain prices above what is reasonable, compared with the prices at which similar goods and similar work may be obtained from the companies outside of the association. It now appears that all corporations, with one or two unimportant exceptions, which have let contracts to the members of this association, are satisfied with the prices, and make affidavit to the fact that they are reasonable, and that the prices furnished are, in the main, considerably below the estimates made by the expert engineers of such companies prior to advertising for the bids. The proof shows, too, that the defendant companies have, at least in certain instances, made quotations on goods to be delivered in the free territory below corresponding prices within the pay territory. It is said by the defendants that this is explained by reason of the difference in the cost of goods manufactured under contracts obtained by bidding, and stock goods which are sold on general orders, and consisting of goods which have been rejected as not coming up to the specifications, and goods manufactured during the winter season in order to keep men and machinery from becoming idle, during which period there is practically no demand by companies which purchase goods on special orders, and contract by bids.

[715] I think it does sufficiently appear that the average prices obtained by this association since its formation are above what was obtained before, though, as above stated, the proof is not sufficient to show that the ruling prices are now above what is reasonable, as determined in the markets and by competition. The defendants, in their answer, deny the purpose attributed to the association by the plaintiff's petition. On the contrary, they say and set up that prior to the association they were engaged in reckless and ruinous compe-

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tition among themselves, as a result of which their business was not prosperous, and under which condition of things it was certain that some or all of them would fail and leave the entire field to such as might be able to survive. It is set up that what is called the "bonus" does not affect the price to the purchaser at all, but that the association determines in the first place what the market price should be, having regard also to the competition to which it is likely to be subjected by other companies not in the association, and that the price is not at any time unreasonable, and that the bonus is merely a mode of determining as between themselves, to an extent, who shall secure the work, but chiefly to make it certain that each company does its fair share of the business, by making the bonus burdensome to such companies as might undertake to do more than their reasonable share of the business within the territory named. It is further said that under the association the business has been fairly divided between the companies, and that they have been enabled to keep all of the plants in operation, their operatives at work, and the machinery from becoming idle. I think it could be safely stated that in some instances prices have been above what was probably fair or reasonable, but the proof fails to show that the average prices have been so. The leading witness for the government was for some time a stenographer in the service of the defendant Chattanooga Foundry & Pipe Works, and in that position did the work of the association, became familiar with all of the details by which the business was conducted, and, after giving up his position, made known to the government's law officer all the facts of the case, and has persistently and industriously corresponded with persons who had dealings with members of the association, and has done all in his power to instigate suits by purchasers from these companies against the associated companies, and has offered to become a witness in their behalf in such suits; always making the condition that he was to be liberally compensated, exacting generally a very large per cent. of what might be recovered. A complete exposure of all the business details of these companies has been thus made. So far, he has not been able to cause any suit to be instituted. But, upon the facts laid before him, the district attorney, under the direc-

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tion of the attorney general, instituted the present suit. It was certainly eminently proper, in view of the disclosures made to the district attorney, that suit should be brought, and an investigation had.

This suit is based upon the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," com- [716] monly called the "Anti-Trust Act" (26 Stat. 209, c. 647; Supp. Rev. St. p. 762). Such of the provisions of the act as affect the matter now under consideration are as follows:

"Section 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act."

When the petition was filed, a restraining order was allowed, and the case is now heard upon the application for a preliminary injunction. The discussion on this motion has taken a wide range, and has proceeded upon the basis that the entire case has been practically developed as much as could be done upon full preparation and a final hearing. The record, so far as made up, consists of the petition, answer, affidavits, and exhibits thereto. A demurrer is incorporated in the answer of the defendants, and the defense rests upon two grounds: (1) That the association is not one subject to the provisions of the act of congress, to enforce which alone this suit is brought; and (2) that the association, in its purposes and mode of doing business, does not constitute a monopoly, and causes no restraint of trade, such as would be unlawful at the common law. It will depend upon the solution of the first question made as to whether or not it will become necessary to examine the second. The question whether this is an association such as subjects it to the provisions of the act of congress is one of some difficulty. This act, like what is known as the "Interstate Commerce Act," is new and experimental legislation by congress. The dis-

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cussion which attended the passage of the act by congress, as shown by the records, makes it plain that the ablest and most thoughtful jurists of that body experienced much of the same difficulty which has since been felt by the courts in the attempt to enforce the act. It was recognized that congress was restricted in anything that it might do upon the particular subjects named in the act to a very narrow field; that the constitutional validity of the legislation was doubtful as a whole. Up to the date of the enactment of the interstate commerce law, and of the act now under consideration, the interstate commerce clause of the constitution, under which legislation of this character is justified, has been considered by the courts almost entirely with relation to state legislation, and its constitutional validity. Nevertheless it will be profitable to refer briefly to the doctrine announced in some of these cases before making any more particular reference to cases in which this act has been considered. It has, of course, been recognized from the beginning that it was no more within the province of congress to legislate upon domestic commerce, or commerce wholly within a state, than it was within the power of the legislature of a state to legislate upon the subject of interstate commerce or trade. In *Nathan v. Louisiana*, 8 How. 73, a tax was [717] imposed on every money or exchange broker, and this legislation was objected to upon the ground that the sole business of the defendant in that case was the buying and selling of foreign bills of exchange, which were instruments of commerce, and the act was repugnant to the constitutional power of congress to regulate commerce with foreign nations and among the several states. It was admitted by the court that foreign bills of exchange were instruments of commerce, but the court also said, in effect, that the products of agriculture or manufacture were in like manner instruments of commerce. Mr. Justice McLean, giving the opinion of the court, said:

"He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on."

The court further pointed out that domestic bills or promissory notes were as necessary to the commerce of a state as

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foreign bills were to the commerce of the Union. In the *State Freight Tax Cases*, 15 Wall. 272, the court observed:

"The transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired."

In *Railroad Co. v. Richmond*, 19 Wall. 584, a contract had been entered into between the Dubuque & Sioux City Railway Company and the Dubuque Elevator Company, both created corporations by the laws of Iowa, by the terms of which contract, among other things, the elevator company was to erect an elevator on land leased from the railroad company, to be situated at Dubuque, for the purpose of receiving, storing, delivering, and handling all grain that should be received by the cars of the railroad company, not otherwise consigned, and to receive and discharge at Dubuque, for the company, all "through grain" by which was meant grain transported, by the terms of shipment, through that place to points beyond, at a certain stated price per bushel. The railroad company stipulated on its part that it would not erect a similar building for receiving, storing, or delivering grain at Dubuque, and would not lease to any others the right to erect any such building; that the elevator company should have the exclusive right to handle all through grain at Dubuque at the stipulated price per bushel. The railroad company having leased its road and property to the Illinois Central Railroad Company, the latter company disregarded the contract; and suit was brought in the United States court to enforce the same on behalf of the elevator company, and the defense was that the contract was repugnant to the constitution, as violating the interstate commerce clause. This defense was overruled, and decree entered in favor of the elevator company, and the case was taken to the supreme court of the United States. The ruling of the lower court was affirmed, and the supreme court, in doing so, enunciated again the controlling rule upon this subject, by saying:

"The power to regulate commerce among the several states was vested in congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation. It was

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never intended that the power should be [718] exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

In *Sherlock v. Alling*, 93 U. S. 100, a statute of the state of Indiana was drawn in question. This statute contained provisions designed for the better security of the lives of the passengers on board vessels propelled in whole or in part by steam, and the contention was that, as applied to marine torts, the act was invalid, as interfering with the exclusive regulation of commerce vested in congress. Mr. Justice Field, discussing this point and referring to previous decisions, used the following language:

"In supposed support of this position, numerous decisions of this court are cited by counsel, to the effect that the states cannot, by legislation, place burdens upon commerce with foreign nations, or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles, as between particular places, was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports, for every passenger landed. In the *Wheeling Bridge Case*, 13 How. 518, the statute of Virginia authorized the erection of a bridge which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 How. 227, the statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile county, a statement, in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state, in addition to those prescribed by congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of congress, as in *Brown v. Maryland*, 12 Wheat. 425, *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton v. Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom."

And in the further progress of the opinion the court observed:

"In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects

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relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution."

It will be readily seen that the cases recognize the distinction between the subjects of commerce and commerce itself, as well as between the instruments and aids to such commerce, and the actual business of commerce. In regard to state legislation, it has been declared from the beginning that, to render such legislation subject to constitutional objection under the commerce clause, the effect of the legislation upon interstate commerce must be direct, and not incidental or indirect. This general statement of the law so often repeated has been illustrated by the varying facts of many cases, but it would extend this opinion beyond reasonable limits to now refer to [719] these. It has often been observed that the line of demarkation between state and federal jurisdiction and regulation is a delicate one, and at times grows dim and shadowy. In considering a question of this delicate nature, proper and practical distinctions become extremely important. A particular business must be distinguished from the mere subjects of the business, and from mere incidents to or instruments by which the business is carried on. It is hardly conceivable that any large industrial or manufacturing establishment could be carried on without shipping products from one state to another, and such would certainly be the course of business contemplated. Nevertheless the business of such an establishment would be related to interstate commerce only incidentally and indirectly. Commerce would not be the main business, nor within the main purpose of the ordinary manufacturing establishment. Interstate commerce would be altogether an incident. There is no direct relation between the two. It is probably true that every wholesale establishment within the limits of the larger cities is engaged in such mode of business as that it is known that the business can be conducted only by the method of interstate commerce in part. Such commerce is, however, not directly affected, and least of all impeded or restricted. If every private enterprise which is carried on in part or chiefly by interstate shipments,

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or by a mode of business which makes this necessary, is to be regarded as thereby so related to interstate commerce as to come within the regulating power of congress, it is obvious that this power could at once be extended to almost every form of business in the country which is conducted on anything like an extensive scale. So liberal an interpretation as this would obviously, in a large sense, obliterate the lines between federal and state jurisdiction, and, as an act of congress is paramount in authority, would strike down the autonomy of the states. The doctrine applicable to this subject was thoughtfully and fully restated by Mr. Justice Lamar in *Kidd v. Pearson*, 128 U. S. 120, 9 Sup. Ct. 10, in language as follows:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation,—the fashioning of raw materials into a change of form, for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce, and the regulation of at least such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in congress and denied to the states, it would follow as an inevitable result that the duty would devolve on congress to regulate all of these delicate, multi-form, and vital interests,—interests which, in their nature, are and must be local in all the details of their successful management. The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable, and utterly inconsistent. Any [730] movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement towards the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These

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instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be exercised by the state, and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine."

The distinction before referred to between commerce and the subjects of commerce, and between the direct and indirect effect of the business, or mode of doing business, upon interstate commerce, is here clearly recognized and declared, as was also done in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, in which the opinion in *Kidd v. Pearson* is expressly referred to, and the ruling reaffirmed. It was easy to anticipate that, when called upon to enforce the provisions of the anti-trust act, the interpretation would be in harmony with the construction of the commerce clause which had been uniformly given in considering state enactments alleged to infringe, or supposed to be an infringement upon, this provision of the constitution. *In re Greene*, 52 Fed. 104-119, is the first case in which the act in question was extensively treated. The question arose upon a petition for a writ of habeas corpus. The defendants and others, under the form of what was called the Distilling & Cattle-Feeding Company, a corporation organized under the laws of Illinois, had obtained possession and authority over such a number of distilleries that the company controlled the manufacture and sale of 75 per cent. of all distillery products in the United States, and the defendants had fixed the price at which the purchasers should and did sell the products of the distilleries. Sales were made to agencies established in Massachusetts and other places, and one of the questions considered was whether this was a combination subject to the provisions of the anti-trust act, under which the defendant had been indicted, and Judge Jackson (afterwards Mr. Justice Jackson) ruled that it was not. Discussing the point of

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whether the whisky trust was subject to the act, the eminent judge observed:

"It is certain that congress could not, and did not by this enactment, attempt to prescribe limits to the acquisition, either by the private citizens or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and [721] manufacture of commodities which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities, just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns." 52 Fed. 115.

And, speaking somewhat more specifically, it was further said:

"It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the distilling and cattle-feeding company to own seventy distilleries and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused or said distilling and cattle-feeding company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products by the enlargement and extension of business was not an attempt to monopolize trade and commerce in such products, within the meaning of the statute, and may therefore be left out of further consideration."

Much of the discussion in the opinion is devoted to showing that the trust arrangement there considered was neither a monopoly nor a contract in restraint of trade, according to the common-law sense, which it was held, in that and subsequent cases, must be allowed to settle the question of what is a monopoly or contract in restraint of trade, in the

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absence of any definition in the act of Congress. In the previous case of *In re Terrell*, 51 Fed. 215, Judge Lacombe had declared that:

"It is not the actual restraint of trade (if such be restraint of trade) that is made illegal by the statute, but the making of a contract in restraint of trade,—of a contract which restrains, or is intended to restrain, trade."

The statute came before the supreme court of the United States for the first time in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249. The American Sugar-Refining Company, a corporation existing under the laws of the state of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock, four other refineries in Philadelphia, and thus obtained such disposition over these refineries throughout the United States as gave it a practical monopoly of the business, and it was held that the result of the transaction was the creation of a monopoly in the manufacture and sale of a necessary of life; but it was nevertheless distinctly held that the monopoly was not one which could be suppressed under the provisions of the act of congress now in question, and that the business of sugar refining in Pennsylvania bore no direct relation to commerce between the states, nor with foreign nations. And the doctrine upon this subject, and the distinctions before adverted to, which pervade all of the previous cases, are again declared in the opinion with great clearness. Mr. Chief Justice Fuller, speaking for the court, said:

[723] "The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall

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be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond or union, the other is essential to the preservation of the autonomy of the states, as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences, by resorts to expedients of even doubtful constitutionally. It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected."

After referring with approval to *Gibbons v. Ogden*, 9 Wheat. 1, 210, *Brown v. Maryland*, and other previous cases, the opinion was concluded by saying:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly direct, as such; or to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property, or the products thereof, should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned and permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states, or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture by the restoration of the status quo before the transfers; yet the act of congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect to contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce."

It is a doctrine expressly stated and clearly implied in these cases that the act of congress does not, and could not constitutionally, deal directly with a monopoly or a contract in restraint of trade, as such, according to the common-law definition of these terms; and, as has been seen, the act of congress gives no definition of its own. To do so would be

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clearly to trench upon the exclusive jurisdiction of the states. Federal authority exists only when a monopoly or a contract in restraint of trade assumes such form or has such effect as to go beyond any common-law conception of these terms, and interferes di- [723] rectly and substantially with interstate commerce or commerce with foreign nations; and this it must do directly, and not incidentally. Now, I am unable to perceive, in the light of these cases, that the act of congress can be regarded as applicable to the association under consideration. It cannot be suggested, and has not been, that this association had in contemplation as one of its purposes the subject of interstate commerce, any more than any ordinary manufacturing establishment would have, where the products of such manufactory must find a market in other states as well as in domestic markets. It seems to me evident that private gain was the object of the association, just as was observed in regard to the sugar trust in *U. S. v. E. C. Knight Co.* Nor does the mode in which the association conducts its business have any direct relation to interstate commerce, so far as I can see. The sugar trust was confessedly a monopoly, in the common-law sense, and in a commodity of prime necessity. And the extent to which interstate commerce would be used in carrying on its business would be in magnitude out of all proportion to a similar use made by the association in question.

The learned district attorney has leveled most of his criticism at the bonus feature of the association, but it has not been pointed out, and, I think, cannot be, how the manner of using the bonus operates in restraint of interstate commerce. The object of the bonus and of the association really is not to prevent all members of the association from furnishing and shipping their manufactured products, but to determine among themselves which one of them shall do so, and it is really contemplated that some one will do so. There is certainly no restraint in this, as the supply in such case is regulated by the demand, so far as shipment is concerned. It has not been argued that the fact that certain cities are reserved to a particular company would bring the association within the provisions of the act. It is true that generally one of the

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reserved cities is that in which the company has its chief place of business. For example, the Chattanooga Foundry & Pipe Works is allowed, under the arrangement, to supply the cities of Chattanooga and New Orleans. If it be argued that this prevents companies in other states from shipping goods to Chattanooga, it would be merely to follow a theory having no practical bearing on the case, because, in the absence of an association, the entire freight charges being in favor of the local company, and the disposition to patronize a local concern being in its favor, it would easily furnish the supplies.

It remains to remark, as should have been done before, that upon the bill and answer, where the contract of the association is admitted in the answer, as is virtually done here, but the allegations tending to show its sinister purpose, tendencies, and effects, contained in the bill, are denied by the answer, and averments are made in the answer tending to show a just and equitable purpose and effect, the averments in such answer upon this application stand admitted, and the contract must be presumed to have been made for the purposes honestly as stated in the answer, unless the provisions of the agreement and the mode of doing business clearly show the contrary. In examination of such a contract, fraud and illegality are not to be presumed, but [724] must be proved as in all other cases. *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 58 Fed. 58. It may be further observed, to prevent misconstruction, that in a suit such as this, in the name of the United States, jurisdiction depends alone upon the act giving jurisdiction to enforce its provisions, and the court is concerned with no case between private persons or corporations, where jurisdiction depends on other conditions, and in which proceeding a common-law remedy might become available. Having reached the conclusion that the defendant association is not subject to the provisions of the act of congress, according to the ruling in *Re Greene* and in *U. S. v. E. C. Knight Co.*, I do not feel called upon to dispose of the other issues made in this case, and the bill is therefore dismissed.

Syllabus.

**[290] UNITED STATES *v.* TRANS-MISSOURI
FREIGHT ASSOCIATION.*****APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.**

No. 67. Argued December 8, 9, 1896.—Decided March 22, 1897.

[166 U. S., 290.]

The dissolution of the freight association does not prevent this court from taking cognizance of the appeal and deciding the case on its merits; as, where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law, and the jurisdiction of the court has attached by the filing of a bill to restrain such or like action under a similar agreement, and a trial has been had and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.^b

While the statutory amount must as a matter of fact be in controversy, yet the fact that it is so need not appear in the bill, but may be shown to the satisfaction of the court.

The provisions respecting contracts, combinations and conspiracies in restraint of trade or commerce among the several States or with foreign countries, contained in the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies," apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property.

The act of February 4, 1887, c. 104, "to regulate commerce," is not inconsistent with the act of July 2, 1890, as it does not confer upon competing railroad companies power to enter into a contract in restraint of trade and commerce, like the one which forms the subject of this suit.

Debates in Congress are not appropriate sources of information, from which to discover the meaning of the language of a statute passed by that body.

* Bill asking the dissolution of the association and for an injunction to restrain the several companies from carrying into effect the agreement was dismissed by the Circuit Court of the United States for the District of Kansas (53 Fed., 440). See p. 80. The decree was affirmed by the Circuit Court of Appeals, Eighth Circuit (58 Fed., 58). See p. 186. Reversed by the Supreme Court in the present case (166 U. S., 290).

^b Syllabus copyrighted, 1897, by Banks & Bros.

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The prohibitory provisions of the said act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation; and are not confined to those in which the restraint is unreasonable.

In order to maintain this suit the government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce, if such restraint is its necessary effect.

This agreement, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it.

The fourth section of the act invests the Government with full power and authority to bring such a suit as this; and, if the facts alleged are proved, an injunction should issue.

On the 2d of July, 1890, an act was passed by the Congress of the United States, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209, c. 647. This act is given in full in the margin.*

* An act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall

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[292] On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill,

be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

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made and entered into an agreement by which they formed themselves into an association to be known as the "Trans-Missouri Freight Association," and they agreed to be governed by the provisions contained in the articles of agreement.

The memorandum of agreement entered into between the railway companies named therein, stated, among other things, as follows: "For the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local, the subscribers do hereby form an association to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions."

"ARTICLE I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

[293] "1. All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian, thence north to the Red River; thence via that river to the eastern boundary line of the Indian Territory; thence north by said boundary line and the eastern line of the State of Kansas to the Missouri River at Kansas City; thence via the said Missouri River to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River line,'—thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico, and thence via said gulf to the point of beginning, including business between points on the boundary line as described.

[294] "2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri River line."

Certain exceptions to the above article are then stated as to the particular business of several railway companies, which was to be regarded as outside and beyond the provisions of the agreement.

Article II provided for the election of a chairman of the organization and for meetings at Kansas City, or otherwise, as might be provided for. By section 2 of that article each road was to "designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is

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present. If unable to attend he shall send a substitute with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents."

Section 3 provides that: "A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

By section 4 it was provided that: "At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah."

Sections 5, 6, 7, 8, 9, 10 and 11 of article II read as follows:

SEC. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decision of the association, as expressed, unless then and there [295] the parties shall give the association definite written notice that, in ten days thereafter, they shall make such modification notwithstanding the vote of the association: *Provided*, That if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"SEC. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule or regulations as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association, and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending

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shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: *Provided, however,* That when one road has a proprietary interest in another, the divisions between such roads shall be [296] what they may elect, and shall not be the property of the association: *Provided, further,* That, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine, by a majority vote (the member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, the amount of each fine not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, the traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented."

Articles 3, 5, 6 and 7 contain appropriate provisions for the carrying out of the purposes of the agreement, but it is not necessary to here set them forth in detail.

[297] Article IV reads as follows:

"ARTICLE IV.

"Any wilful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any wilful violation of them shall be subject to the penalties provided herein."

Article VIII provides that the agreement should take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from the same.

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On the 6th of January, 1892, the United States, as complainant, filed in the Circuit Court of the United States for the District of Kansas, through the United States attorney for that district, and under the direction of the Attorney General of the United States, its bill of complaint against the Trans-Missouri Freight Association, named in the agreement above mentioned, the Atchison, Topeka and Santa Fé Railroad Company, and some seventeen other railroad companies, the officers of which had, it was alleged, signed the agreement above mentioned in behalf of and for their respective companies. The bill was filed by the Government for the purpose of having the agreement between the defendant railroad companies set aside and declared illegal and void, and to have the association dissolved.

It alleged that the defendant railroad corporations, signing the agreement, were at that time and ever since had been common carriers of all classes and kinds of freight and commodities which were commonly moved, carried and transported by railroad companies in their freight traffic, and at all such times had been, and then were, continuously engaged in transporting freight and commodities in the commerce, trade and traffic which is continuously carried on among and between the several States of the United States, and among [298] and between the several States and Territories of the United States, and between the people residing in, and all persons engaged in trade and commerce within and among and between, the States, Territories and countries aforesaid; that each of the defendants was, prior to the 15th day of March, 1889, the owner and in the control of, and that they were respectively operating and using, distinct and separate lines of railroad, fitted up for carrying on business as such carriers in the freight traffic above mentioned, independently and disconnectedly with each other, and that said lines of railroad had been and then were the only lines of transportation and communication engaged in the freight traffic between and among the States and Territories of the United States having through lines for said freight traffic in all that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean; that these lines of railroad furnish to the public and to persons engaged

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in trade and traffic and commerce between the several States and Territories and countries above mentioned separate, distinct and competitive lines of transportation and communication extending along and between the States and Territories of the United States lying westward of the Mississippi and Missouri rivers to the Pacific Ocean, and that the construction and maintenance of said several separate, distinct and competitive lines of railroad aforesaid had been encouraged and assisted by the United States and by the States and Territories in the region of country aforesaid, and by the people of the said several States and Territories, by franchises and by grants and donations of large amounts of land of great value, and of money and securities, for the purpose of securing to the public and to the people engaged in trade and commerce throughout the region of country aforesaid competitive lines of transportation and communication, and that prior to the 15th day of March, 1889, and subsequently and up to the present time, each and all of said defendants have been and are engaged as common carriers in the railway freight traffic connected with the interstate commerce of the United States.

It was then alleged in the bill as follows:

[290] "And your orator further avers that on or about the fifteenth day of March, 1889, the defendants not being content with the usual rates and prices for which they and others were accustomed to move, carry and transport property, freight and commodities in the trade and commerce aforesaid and in their said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, and to counteract the effect of free competition on the facilities and prices of transportation, and to establish and maintain arbitrary rates, and to prevent any one of said defendants from reducing such arbitrary rates, and thereby exact and procure great sums of money from the people of the said States and Territories aforesaid, and from the people engaged in the interstate commerce, trade and traffic within the region of country aforesaid, and from all persons having goods, wares and merchandise to be transported by said railroads, and intending to monopolize the trade, traffic and commerce among and between the States and Territories aforesaid, did combine, conspire, confederate and unlawfully agree together, and did then and there enter into a written contract, combination, agreement and compact, known as a memorandum of agreement of the Trans-Missouri Freight Association, which was signed by each of said above-named defendants."

The bill then set forth the agreement signed by the various corporations defendant.

It was further alleged that the agreement went into effect

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on the 1st day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroads the rules and regulations and rates and prices for moving, carrying and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroads rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each [300] particular road, and the people of the States and Territories subject to said association, and all persons engaged in trade and commerce within, among and between the different States and Territories had been compelled to and were still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association, and ever since that date had been and still were deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and were deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned, and that the trade, traffic and commerce in such region of country, and the freight traffic in connection therewith, had been and were monopolized and restrained, hindered, injured and retarded by the defendants by means of and through the instrumentality of such association.

The bill further averred that notwithstanding the passage of the act of Congress above mentioned on the 2d day of July, 1890, the "defendants still continue in and still engage in said unlawful combination and conspiracy, and still maintain said Trans-Missouri Freight Association, with all the powers specified in the memorandum of agreement and articles of association hereinbefore set forth, which said agreement, combination and conspiracy so as aforesaid entered into and maintained by said defendants is of great injury and grievous prejudice to the common and public good and to the welfare of the people of the United States."

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The prayer of the bill was as follows:

"In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court where matters of this nature are properly cognizable and relleable, your orator prays that this honorable court may order, adjudge and decree that said Trans-Missouri Freight Association be dissolved, and that said defendants, and all and each of them, be enjoined and prohibited from further agreeing, combining and conspiring and acting together to maintain rules and regulations and rates for carry- [301] ing freight upon their several lines of railroad to hinder trade and commerce between the States and Territories of the United States, and that all and each of them be enjoined and prohibited from entering or continuing in a combination, association or conspiracy to deprive the people engaged in trade and commerce between and among the States and Territories of the United States of such facilities and rates and charges of freight transportation as will be afforded by free and unrestrained competition between the said several lines of railroad, and that all and each of said defendants be enjoined and prohibited from agreeing, combining and conspiring and acting together to monopolize or attempt to monopolize the freight traffic in the trade and commerce between the States and Territories of the United States, and that all and each of said defendants be enjoined and prohibited from agreeing, combining and conspiring and acting together to prevent each and any of their associates from carrying freight and commodities in the trade and commerce between the States and Territories of the United States at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf."

The defendants were required to answer fully, etc., each and all of the matters charged in the bill, but such answer was not required to be under oath, an answer under oath being specially waived.

The Chicago, Kansas and Nebraska Railway Company, the Missouri, Kansas and Texas Railway Company and the Denver, Texas and Fort Worth Railroad Company denied being parties to the association. The other fifteen companies filed separate answers, each setting up substantially the same defence.

They admitted they were common carriers engaged in the transportation of persons and property in the States and Territories mentioned in the agreement, and they alleged that as such common carriers they were subject to the provisions of the act of Congress, approved February 4, 1887, c. 104, 24 Stat. 379, entitled "An act to regulate commerce," with the various amendments thereof and additions thereto, [302] and they alleged that that act and the amendments con-

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stituted a system of regulations established by Congress for common carriers subject to the act, and they denied that they were subject to the provisions of the act of Congress passed July 2, 1890, above set forth.

They admit that they severally own, control and operate separate and distinct lines of railroad constructed and fitted for carrying on business as common carriers of freight, independently and disconnectedly with each other; except that a common interest exists between certain companies, named in the answer. They admit that the lines of railroad mentioned in the bill furnish lines of transportation and communication to persons engaged in freight traffic between and among the States and Territories of the United States, having through lines for freight traffic in that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean, but deny that they are the only such lines, and allege that there are several others, naming them.

They further admitted that prior to the organization of the freight association the defendants furnished to the public and to persons engaged in trade, traffic and commerce between the several States and Territories named in the agreement, separate, distinct and competitive lines of transportation and communication, and they allege that they still continue to do so.

They admitted that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from States and Territories by loans of credits, donations of depot sites and rights of way, and in a few cases by investments of money, and that the people of the States and Territories to a limited extent made investments in the stocks and bonds of some of the roads, while others, mentioned in the bill, were almost exclusively constructed by capital furnished by non-residents of that region.

It was also admitted that the purpose of the land grants, loans, donations and investments was to obtain the construction of competitive lines of transportation and communication to the end that the public and the people engaged in trade [303] and commerce throughout that region of country might have facilities afforded by railways in communicating

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with each other and with other portions of the United States and the world, and denied that they were granted for any other purpose.

The defendants admitted the formation on or about March 15, 1889, of the voluntary association described in the bill as the "Trans-Missouri Freight Association."

They denied the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they denied any intent to unjustly increase rates, and denied that the agreement destroyed, prevented or illegally limited or influenced competition; they denied that arbitrary rates were fixed or charged, or that rates had been increased, or that the effect of free competition had been counteracted; they denied any purpose in the formation of the association to monopolize trade, traffic and commerce between the States and Territories within the region mentioned in the bill; and they denied that the agreement was in any respect the illegal result of any unlawful confederation or conspiracy. The defendants alleged that the proper object of the association was to establish reasonable rates, rules and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the Interstate Commerce Commission as required by section 6 of the act of February 4, 1887. They also alleged that it was not the purpose of the association to prevent the members from reducing rates or changing the rules and regulations fixed by the association; that by the terms of the agreement each member might do so, the preliminary requirement being that the proposed change should be voted upon at a meeting of the association, after which, if the proposal was not agreed to, the line making the proposal could make such reduced rate notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule or regulation by all lines interested and an interchange of views on the effect of such [204] reduction, and that reductions of rates had been made in numerous instances through said process by the association. They admitted that the agreement took effect April 1, 1889, and that it had remained in operation since, and that

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the rates, rules and regulations fixed and established from time to time under said agreement had been put into effect and maintained in conformity to law; and it was denied that by reason of the agreement or under duress of fines and penalties, or otherwise, the defendants had refused to establish and maintain just and reasonable rates; and it was alleged that the object of the association at all times had been and was to establish all rates, rules and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They denied that shippers or the public were in any way oppressed or injured by reason of the rates fixed by the association, but on the contrary they alleged that the agreement and the association established under it had been beneficial to the patrons of the railway lines composing the association and the public at large. These in substance were the allegations in the various answers.

The cause came on for hearing on bill and answer before the Circuit Court of the United States for the District of Kansas, First Division. That court dismissed the bill without costs against the complainant. 53 Fed. Rep. 440. The Government duly appealed from the judgment to the United States Circuit Court of Appeals for the Eighth Circuit, and that court after argument affirmed, in October, 1893, the judgment of the Circuit Court, without costs, Shiras, District Judge, dissenting. 19 U. S. App. 36. From that judgment the Government appealed to this court.

A motion was made upon affidavits to dismiss the appeal. The affidavits show that on the 18th of November, 1892, a resolution was adopted by the Trans-Missouri Freight Association, one of the defendants, providing that the organization should be discontinued from and after the 19th of November, 1892, and the secretary was instructed to wind up its affairs at as early a date as possible. It further appeared by the affidavits that the Trans-Missouri Freight Association was [305] actually dissolved and its existence ended on the above date, November 19, 1892, and that it has not since that date been revived, nor has it since that date had any activity of any kind, "and that it has not conducted or been engaged in any operations or business whatever, but that it has been dead and out of existence."

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It also alleged as another ground for dismissing the appeal that the matter in controversy does not exceed \$1000, and that the case does not come under any other provision of the act of 1891, allowing an appeal from the Circuit Courts of Appeals to this court. In opposition to the motion it appeared upon the part of the appellant that at the same meeting at which the resolution above referred to was adopted, the following resolution was also adopted: "*Resolved*, That a committee of seven be appointed by the chairman of this meeting to draw up a new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement and to make a report to all lines in the Trans-Missouri Association at a meeting to be called in Chicago on December 6, 1892." A committee of seven was accordingly appointed, which adopted a resolution calling a meeting for the 6th of December, 1892, of the lines formerly members of the Trans-Missouri Association and representatives of other interested lines for the purpose of considering any changes in the tariffs and of business which was under the jurisdiction of that association and which might be submitted to the parties at that time, and to further consider the organization of one or more rate committees to govern the manner of making rates on such traffic until some permanent organization could be effected. In the early days of December, 1892, the meeting so called was held and was participated in by most of the railroad companies which were parties to the Trans-Missouri agreement, and at that meeting an agreement was made upon the subject of rates of freight, and a West-Missouri freight rate committee was appointed, the duties of which committee were to establish and maintain reasonable rates in the territory described, and other lines not therein represented but interested in the freight traffic of such territory were to be invited to become members. A plan for [306] the establishment of subrate committees for the purpose of agreeing upon rates was therein set forth and agreed to. The agreement was to become effective on the 1st of January, 1892, and to remain in force until the following April, during which time it was supposed that a new and permanent association to provide for an agreement relating to rates of freight might be founded. It does not appear whether such permanent asso-

Counsel for Parties.

ciation has been formed or that the temporary agreement has been actually terminated.

In answer to the motion to dismiss on the ground that the matter in controversy did not amount to over a thousand dollars, the parties have stipulated as follows: "It is hereby stipulated for the purposes of this case and no other, and without waiving any right to question the legal effect of such fact, that the daily freight charges on interstate shipments collected by all the railway companies at points where they compete with each other were, at the time of the agreement mentioned in the pleadings herein, and have been since, more than one thousand dollars."

To the motion made to dismiss the appeal for want of jurisdiction, briefs were filed as follows:

Mr. W. F. Guthrie filed a brief on behalf of the Burlington and Missouri River Railroad Company in support of the motion.

Mr. Lloyd W. Bowers filed a brief on behalf of the Atchison, Topeka and Santa Fé Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Fremont, Elkhorn and Missouri Valley Railroad Company, The Sioux City and Pacific Railroad Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company in support of the motion.

Mr. Attorney General and *Mr. Assistant Attorney General Whitney* for the United States filed a brief opposing the motion.

[307] At the hearing on the merits one hour additional time was, on motion of *Mr. Dillon*, allowed to each side.

Mr. Attorney General for the United States, appellants.

Mr. John F. Dillon for the Freight Association, appellees.
Mr. A. L. Williams, *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on his brief.

Mr. James C. Carter for the Freight Association, appellees.

Mr. E. J. Phelps for the Freight Association and the New York Central and Hudson River Railroad Company, appellees.

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Mr. Attorney General concluded for appellants.

Mr. W. F. Guthrie filed a brief on behalf of the Burlington and Missouri River Railroad Company.

Mr. Lloyd W. Bowers filed a brief for the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The defendants object to the hearing of this appeal, and ask that it be dismissed on the ground that the Trans-Missouri Freight Association has been dissolved by a vote of its members since the judgment entered in this suit in the court below. A further ground urged for the dismissal of the appeal is that the requisite amount (over one thousand dollars) is not in controversy in the suit, and that as an appeal would only lie to this court in this character of suit under the act of March 3, 1891, c. 517, 28 Stat. 826, where that amount is in controversy, the appeal should be dismissed.

As to the first ground, we think the fact of the dissolution of the association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits.

[308] The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing or combining and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future.

The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever

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with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate and salutary one, and that it or one like it is necessary to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion.

As an answer to the fact of the dissolution of the association, it is shown on the part of the Government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which was to remain in force for [309] a certain time, and under which the companies acted, and in regard to which it does not appear that they are not still acting. If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had,

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and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by [310] the Government. That question the Government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided.

We think, therefore, the first ground urged by defendants for the dismissal of the appeal is untenable.

We have no difficulty either in sustaining the jurisdiction of this court in regard to the second ground, that of the amount in controversy in the suit.

The bill need not state, in so many words, that a certain amount exceeding one thousand dollars is in controversy in order that this court may have jurisdiction on appeal. The statutory amount must as a matter of fact be in controversy, yet that fact may appear by affidavit after the appeal is taken to this court, *Whiteside v. Haselton*, 110 U. S. 296; *Red River Cattle Co. v. Needham*, 137 U. S. 632, or it may be made to appear in such other manner as shall establish it to the satisfaction of the court. A stipulation between the parties as to the amount is not controlling, but in the discretion of the court it may be regarded in a particular case, and with reference to the other facts appearing in the record as suffi-

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cient proof of the amount in controversy to sustain the jurisdiction of this court.

The bill shows here an agreement entered into (as stated in the agreement itself) for the purpose of maintaining reasonable rates to be received by each company executing the agreement, and the stipulation entered into between the parties hereto shows that the daily freight charges on interstate shipments collected by the railway companies at points where they compete with each other were, at the time of the making of the agreement mentioned in the pleadings herein and have been since, more than one thousand dollars. This agreement so made, the Government alleges, is illegal as being in restraint of trade, and was entered into between the companies for the purpose of enhancing the freight rates. The companies, while denying the illegality of the agreement or its purpose to be other than to maintain reasonable rates, yet allege that without some such agreement the competition between them for [311] traffic would be so severe as to cause great losses to each defendant and possibly ruin the companies represented in the agreement. Such a result, it is claimed, is avoided by reason of the agreement. Upon the existence, therefore, of this or some similar agreement directly depends (as is alleged) the prosperity, if not the life, of each company. It must follow that an amount much more than a thousand dollars is involved in the maintenance of the agreement or in the right to maintain it or something like it. These facts, appearing in the record and the stipulation, show that the right involved is a right which is of the requisite pecuniary value. A reduction of the rates by only the fractional part of one per centum would, in the aggregate, amount to over a thousand dollars in a very few days. This is sufficient to give the court jurisdiction on appeal. *South Carolina v. Seymour*, 153 U. S. 353, 357. There is directly involved in this suit the validity and the life of this agreement, or one similar to it. Out of this agreement directly springs the ability as well as the right to maintain these rates, and each company is interested in maintaining the validity of the agreement to the same extent as all the others. As against the agreement the Government represents the interest of the public, and thus the parties stand opposed to

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each other—the one in favor of dissolving and the other of maintaining the agreement.

Unlike the case of *Gibson v. Shufeldt*, 122 U. S. 27, and the cases therein cited in the opinion of the court delivered by Mr. Justice Gray, the defendants here are jointly interested in the question, and it is not the case of a fund amounting to more than the requisite sum which is to be paid to different parties in sums less than the jurisdictional amount.

For the reasons above stated, we think the jurisdictional fact in regard to each defendant appears plainly and necessarily from the record and the stipulation, and that the duty is thus laid upon this court to entertain the appeal.

Coming to the merits of the suit, there are two important questions which demand our examination. They are, first, whether the above-cited act of Congress (called herein the Trust Act) applies to and covers common carriers by railroad; [312] and, if so, second, does the agreement set forth in the bill violate any provision of that act?

As to the first question:

The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the

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owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. *State Freight Tax case*, 15 Wall. 232, 275; *Telegraph Co. v. Texas*, 105 U. S. 460, 464. [313] An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce. What amounts to a restraint within the meaning of the act if thus construed need not now be discussed.

We have held that the Trust Act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of *United States v. E. C. Knight Company*, 156 U. S. 1, because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon.

Nor do we think that because the sixth section does not forfeit the property of the railroad company when merely engaged in the transportation of property owned under and which was the subject of a contract or combination mentioned in the first section, any ground is shown for holding the rest of the act inapplicable to carriers by railroad. It is not perceived why, if the rest of the act were intended to apply to such a carrier, the sixth section ought necessarily

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to have provided for the seizure and condemnation of the locomotives and cars of the carrier engaged in the transportation between the States of those articles of commerce owned as stated in that sixth section. There is some justice and propriety in forfeiting those articles, but we see none in forfeiting the locomotives or cars of the carrier simply because such carrier was transporting articles as described from one State to another, even though the carrier knew that they had been manufactured or sold under a contract or combination in violation of the act. In the case of a simple transportation of such articles the carrier would be guilty of no violation of any of the provisions of the act. Why, there- [814] fore, would it follow that the sixth section should provide for the forfeiture of the property of the carrier if the rest of the act were intended to apply to it? To subject the locomotives and cars to forfeiture under such circumstances might also cause great confusion to the general business of the carrier and in that way inflict unmerited punishment upon the innocent owners of other property in the course of transportation in the same cars and drawn by the same locomotives. If the company itself violates the act, the penalties are sufficient as provided for therein.

But it is maintained that an agreement like the one in question on the part of the railroad companies is authorized by the Commerce Act, which is a special statute applicable only to railroads, and that a construction of the Trust Act (which is a general act) so as to include within its provisions the case of railroads, carries with it the repeal by implication of so much of the Commerce Act as authorized the agreement. It is added that there is no language in the Trust Act which is sufficiently plain to indicate a purpose to repeal those provisions of the Commerce Act which permit the agreement; that both acts may stand, the special or Commerce Act as relating solely to railroads and their proper regulation and management, while the later and general act will apply to all contracts of the nature therein described, entered into by any one other than competing common carriers by railroad for the purpose of establishing rates of traffic for transportation. On a line with this reasoning it is said that if Congress had intended to in any manner affect

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the railroad carrier as governed by the Commerce Act, it would have amended that act directly and in terms, and not have left it as a question of construction to be determined whether so important a change in the commerce statute had been accomplished by the passage of the statute relating to trusts.

The first answer to this argument is that, in our opinion, the Commerce Act does not authorize an agreement of this nature. It may not in terms prohibit, but it is far from conferring either directly or by implication any authority to make it. If the agreement be legal it does not owe its [315] validity to any provision of the Commerce Act, and if illegal it is not made so by that act. The fifth section prohibits what is termed "pooling," but there is no express provision in the act prohibiting the maintenance of traffic rates among competing roads by making such an agreement as this, nor is there any provision which permits it. Prior to the passage of the act the companies had sometimes endeavored to regulate competition and to maintain rates by pooling arrangements, and in the act that kind of an arrangement was forbidden. After its passage other devices were resorted to for the purpose of curbing competition and maintaining rates. The general nature of a contract like the one before us is not mentioned in or provided for by the act. The provisions of that act look to the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and the short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the language of counsel for defendants, "without reference to the location of those points or the lines over which it is necessary for the traffic to pass," to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates. Competing and non-connecting roads are not authorized by this statute to make an agreement like this one.

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As the Commerce Act does not authorize this agreement, argument against a repeal by implication, of the provisions of the act which it is alleged grant such authority, becomes ineffective. There is no repeal in the case, and both statutes may stand, as neither is inconsistent with the other.

It is plain, also, that an amendment of the Commerce Act would not be an appropriate method of enacting the legislation contained in the Trust Act, for the reason that the latter act includes other subjects in addition to the contracts of or combinations among railroads, and is addressed to the [316] prohibition of other contracts besides those relating to transportation. The omission, therefore, to amend the Commerce Act furnishes no reason for claiming that the later statute does not apply to railroad transportation. Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any subsequent act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field.

The existence of agreements similar to this one may have been known to Congress at the time it passed the Commerce Act, although we are not aware, from the record, that an agreement of this kind had ever been made and publicly known prior to the passage of the Commerce Act. Yet if it had been known to Congress, its omission to prohibit it at that time, while prohibiting the pooling arrangements, is no reason for assuming that when passing the Trust Act it meant to except all contracts of railroad companies in regard to traffic rates from the operation of such act. Congress for its own reasons, even if aware of the existence of such agreements, did not see fit when it passed the Commerce Act to prohibit them with regard to railroad companies alone, and the act was not an appropriate place for general legislation on the subject. And at that time, and for several years thereafter, Congress did not think proper to legislate upon the

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subject at all. Finally it passed this Trust Act, and in our opinion no obstacle to its application to contracts relating to transportation by railroads is to be found in the fact that the Commerce Act had been passed several years before, in which the entering into such agreements was not in terms prohibited.

It is also urged that the debates in Congress show beyond a doubt that the act as passed does not include railroads. Counsel for the defendants refer in considerable detail to its history from the time of its introduction in the Senate to its final passage. As the act originally passed the Senate the first section was in substance as it stands at present in the statute. On its receipt by the House that body proposed an amendment, by which it was in terms made unlawful to enter into any contract for the purpose of preventing competition in the transportation of persons or property. As thus amended the bill went back to the Senate, which itself amended the amendment by making the act apply to any such contract as tended to raise prices for transportation above what was just and reasonable. This amendment by the Senate of the amendment proposed by the House was disagreed to by that body. The amendments were then considered by conference committees, and the first conference committee reported to each house in favor of the amendment of the Senate. This report was disagreed to and another committee appointed, which agreed to strike out both amendments and leave the bill as it stood when it first passed the Senate, and that report was finally adopted, and the bill thus passed.

Looking at the debates during the various times when the bill was before the Senate and the House, both on its original passage by the Senate and upon the report from the conference committees, it is seen that various views were declared in regard to the legal import of the act. Some of the members of the House wanted it placed beyond doubt or cavil that contracts in relation to the transportation of persons and property were included in the bill. Some thought the amendment unnecessary as the language of the act already covered it, and some refused to vote for the amendment or for the bill if the amendments were adopted on the ground that it would then interfere with the Interstate Commerce Act, and tend to cre-

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ate confusion as to the meaning of each act. Senator Hoar (who was a member of the first committee of conference from the Senate), when reporting the result arrived at by the judiciary committee recommending the adoption of the House amendment, said: "The other clause of the House amendment is that contracts or agreements entered into for the purpose of [§18] preventing competition in the transportation of persons or property from one State or Territory into another shall be deemed unlawful. That, the committee recommend shall be concurred in. *We suppose that it is already covered by the bill as it stands*; that is, that transportation is as much trade or commerce among the several States as the sale of goods in one State to be delivered in another, and, therefore, that it is covered already by the bill as it stands. But there is no harm in agreeing in an amendment which expressly describes it, and an objection to the amendment might be construed as if the Senate did not mean to include it; so we let it stand."

Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen v. Hertford College*, 3 Q. B. D. 693, 707.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members

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of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort [319] to the history of the times when it was passed. (Cases cited, *supra*.) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation.

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the state governments to successfully cope with them because of their commercial character and of their business extension through the different States of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the rail-

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roads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different [§20] roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom.

Our attention is also called to one of the rules for the construction of statutes which has been approved by this court; that while it is the duty of courts to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so in order to carry out the legislative intent. *Brewer v. Blougher*, 14 Pet. 178, 198; *Petri v. Commercial Bank of Chicago*, 142 U. S. 644, 650; *McKee v. United States*, 164 U. S. 287. It is therefore urged that if, by a strict construction of the language of this statute it may be made to include railroads, yet it is evident from other considerations now to be mentioned that the real meaning of the legislature would not include them, and they must for that reason be excluded. It is said that this meaning is plainly to be inferred, because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand, and railroad transportation on the other. Among these differences are the public character of railroad business, and as a result the peculiar power of control and regulation possessed by the State over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different

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individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or [321] unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business. It is also urged that there are evils arising from unrestricted competition in regard to railroads which do not exist in regard to any other kind of property, that it is so admitted by the latest and best writers on the subject, and that practical experience of the results of unrestricted competition among railroads tends directly to the same view; that the difference between railroad property on the one hand, and all other kinds of property on the other hand, is so plain that entirely different economic results follow from unrestricted competition among railroads from those which obtain in regard to all other kinds of business. It is also said that the contemporaneous industrial history of the country, the legal situation in regard to railroad properties at the time of the enactment of this statute, its legislative history, the ancient and constantly maintained different legal effect and policy regarding railway transportation and ordinary trade and manufacture, together with a just regard for interests of such enormous magnitude as are represented by the railroads of the country, all tend to show that Congress in passing the Anti-Trust Act never could have contemplated the inclusion of railroads within its provisions. It is, therefore, claimed to be the duty of the court, in carrying out the rule of statutory construction, above stated, to restrict the meaning of these general words of the statute which would include railroads, because, from the considerations above mentioned, it is plain that Congress never intended that railroads should be included.

Many of the foregoing assertions may be well founded, while at the same time the correctness of the conclusions sought to be drawn therefrom need not be conceded. The points of difference between the railroad and other corporations are many and great. It cannot be disputed that a rail-

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road [322] is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature. The company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons; nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things. But the very fact of the public character of a railroad would itself seem to call for special care by the legislature in regard to its conduct, so that its business should be carried on with as much reference to the proper and fair interests of the public as possible. While the points of difference just mentioned and others do exist between the two classes of corporations, it must be remembered they have also some points of resemblance. Trading, manufacturing and railroad corporations are all engaged in the transaction of business with regard to articles of trade and commerce, each in its special sphere, either in manufacturing or trading in commodities or in their transportation by rail. A contract among those engaged in the latter business by which the prices for the transportation of commodities traded in or manufactured by the others is greatly enhanced from what it otherwise would be if free competition were the rule, affects and to a certain extent restricts trade and commerce, and affects the price of the commodity. Of this there can be no question. Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which when carried out affect the interests of the public. Why should not a railroad company be included in general legislation aimed at the prevention of that kind of agreement made in restraint of trade, which may exist in all companies, which is substantially of the same nature wherever found, and which tends very much towards the same results, whether put in practice by a trading and manufacturing or by a railroad company? It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggran- [323] dizement as against the public interest. In business or trading combi-

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nations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purpose, leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to

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raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common. It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business; but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same [§25] statute by general language sufficiently broad to include them both. We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference in the nature or kind of these trading

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or manufacturing companies from railroad companies, which would lead us to the conclusion that it cannot be supposed the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads within the purview of that act.

Neither is the statute, in our judgment, so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one State to or through another it is interstate commerce. To be reached by the Federal statute it must be commerce among the several States or with foreign nations. When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign. Transportation of commodities among the several States or with foreign nations falls within the description of the words of the statute with regard to that subject, and there is also included in that language that kind of trade in commodities among the States or with foreign nations which is not confined to their mere transportation. It includes their purchase and sale. Precisely at what point in the course of the trade in or manufacture of commodities the statute may have effect upon them, or upon contracts relating to them, may be somewhat difficult to determine, but interstate transportation presents no difficulties. In *United States v. E. C. Knight Co.* 156 U. S. 1, heretofore cited, it was in substance held, reiterating the language of Mr. Justice Lamar in *Kidd v. Pearson*, 128 U. S. 1, that the intent to manufacture or export a manufactured article to foreign nations or to send it to another State did not determine the time when the article or product passed from the control of the State and [326] belonged to commerce. The difficulty in determining that question, however, is no reason for denying effect to language which, by its terms, plainly includes the transportation of commodities among the several States or with foreign nations, and which may also be the subject of contracts or combinations in restraint of such commerce. The difficulty

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of the subject, so far as the trade in or the manufacture of commodities is concerned, arises from the limited control which Congress has over the matter of trade or manufacture. It was said by Mr. Justice Lamar in *Kidd v. Pearson* (*supra*): "If it be held that the term " (commerce) "includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries and mining—in short, every branch of human industry."

In the *Knight Company case* (*supra*) it was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life. It is readily seen from these cases that if the act do not apply to the transportation of commodities by railroads from one State to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative.

Still another ground for holding the act inapplicable is urged, and that is that the language covers only contracts or combinations like trusts or those which, while not exactly trusts, are otherwise of the same form or nature. This is clearly not so.

While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.

We think, after a careful examination, that the statute [327] covers, and was intended to cover, common carriers by railroad.

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or

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with foreign nations, is hereby declared to be illegal" ? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature ?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the [328] act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact

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restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion [§29] of that subject they have shown that there has been a gradual though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the *bona fide* consideration for the promise and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to

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granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the law-making body that enacted it.

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business upon which to found the claim, that although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in unreasonable restraint of trade. In order to do this the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again draw attention to the fact of the peculiar nature of [330] railroad property. When a railroad is once built, it is said, it must be kept in operation; it must transport property, when necessary in order to keep its business, at the smallest price and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not to do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public; that a contest between a receiver of an insolvent corporation and one which is still

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solvent tends to ruin the latter company, while being of no benefit to the former; that a receiver is only bound to pay operating expenses, so he can compete with the solvent company and oblige it to come down to prices incompatible with any profit for the work done, and until ruin overtakes it to the destruction of innocent stockholders and the impairment of the public interests.

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will [331] be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in re-

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straint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments it must be confessed bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is [332] the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of deter-

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mining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen *in invitum* is not the least, *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 657; that many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations, and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for [333] their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair their usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to

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defend its interests both in and out of Congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

It was said in *Gibbs v. Baltimore Gas Company*, 130 U. S. 396, at page 408, by Mr. Chief Justice Fuller, as follows: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Shepard v. Milwaukee Gas Co.*, 6 Wisconsin, 539; *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Illinois, 530; *St. Louis v. St. Louis Gas Light Co.*, 70 Missouri, 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, *Printing &c. Registering Co. v. Sampson*, L. R. 19 Eq. 462, yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or [334] sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c. Gas Co. v. People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Georgia, 160."

It is true that in the *Gibbs case* there was a special statute which prohibited the company from entering into any consolidation, combination or contract with any other gas company whatever, and it was provided that any attempt to do so or to make such combination or contract should be utterly null and void. The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation—that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business—and it is seen that while, in the absence of a statute prohibiting them, contracts

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of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.

The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce. There are many cases which look in that direction if they do not precisely decide that point. Some of them are referred to in the opinion in the *Baltimore Gas Company case*, above cited. The case of the *Mogul Steamship Company v. McGregor*, 21 Q. B. D. 544; 23 Q. B. D. 598; 1892, App. Cas. 25, has been cited by the courts below as holding in principle that contracts of this nature are valid at common law. The agreement held valid there was [335] an agreement for lowering rates of transportation among the parties thereto, and it was entered into for the purpose of driving out of trade rival steamships in order that thereafter the rates might be advanced. The English courts held that the agreement was not a conspiracy, and that it was valid, although the result aimed at was to drive a rival out of the field, because so long as the injury to such rival was not the sole reason for the agreement, but self-interest the predominating motive, there was nothing wrong in law with an agreement of that kind. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The provisions of the Interstate Commerce Act relating to reasonable rates, discriminations, etc., do not authorize such an agreement as this, nor do they authorize any other agreements which would be inconsistent with the provisions of this act.

The general reasons for holding agreements of this nature to be invalid even at common law, on the part of railroad companies are quite strong, if not entirely conclusive.

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Considering the public character of such corporations, the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that Congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse.

It is true that, as to a majority of those living along its line, each railroad is a monopoly. Upon the subject now under consideration it is well said by Judge Oliver P. Shiras, United States District Judge, Northern District of Iowa, in his very able dissenting opinion in this case in the United States Circuit Court of Appeals, as follows:

[336] "As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of this corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country. . . . A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein. . . . In the opinion of the court are found citations from the reports of the Interstate Commerce Commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate

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charges, and the advantages that are gained in many directions by proper conference and concert of action among the com- [337] peting lines. It may be entirely true that as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that because railway companies *through their own action cause evils to themselves* and the public by sudden changes or reductions in tariff rates they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they can not, by combination and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates."

[338] The whole opinion is a remarkably strong presentation of the views of the learned judge who wrote it.

Still, again, it is answered that the effects of free competition among railroad companies, as described by the counsel for the companies themselves in the course of their argument, are greatly exaggerated. According to that argument, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving, perhaps, one to raise rates indefinitely when its rivals have been driven away. It is said that this is a most overdrawn statement, and that while absolutely free competition may have in some instances and for a time resulted in injury to some of the railroads, it is not at all clear that the general result has been other than beneficial to the whole public, and not in the long run detrimental to

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the prosperity of the roads. It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. Rate wars go on notwithstanding any agreement to the contrary, and the struggle for business among competing roads keeps on, and in the nature of things will keep on, any alleged agreement to the contrary notwithstanding, and it is only by the exercise of good sense and by the presence of a common interest that railroads, without entering into any affirmative agreement in regard thereto, will keep within the limit of exacting a fair and reasonable return for services rendered. These agreements have never been found really effectual for any extended period.

The Interstate Commerce Commission, from whose reports quotations have been quite freely made by counsel for the purpose of proving the views of its learned members in regard to this subject, has never distinctly stated that agreements among competing railroads to maintain prices are to be commended, or that the general effect is to be regarded as beneficial. They have stated in their fourth annual report that competition may degenerate into rate wars, and that such wars are as unsettling to the business of the country [339] as they are mischievous to the carriers, and that the spirit of existing law is against them. They then add: "Agreements between railroad companies which from time to time they have entered into with a view to prevent such occurrences have never been found effectual, and for the very sufficient reason, that the mental reservations in forming them have been quite as numerous and more influential than the written stipulations." It would seem true, therefore, that there is no guaranty of financial health to be found in entering into agreements for the maintenance of rates, nor is financial ruin or insolvency the necessary result of their absence.

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the

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way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged that there is a necessity, in order that the public interest may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

[340] The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and

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ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any con- [341] tract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is

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denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt [342] that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

One or two subsidiary questions remain to be decided.

It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation.

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Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise.

It is also argued that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the fourth section of [§43] the act invests the Government with full power and authority to bring such an action as this, and if the facts be proved, an injunction should issue. Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy. The subject is fully and ably discussed in the case of *In re Debs*, 158 U. S. 564. See also *Cincinnati, New Orleans &c. Railway v. Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197.

For the reasons given, the decrees of the United States Circuit Court of Appeals and of the Circuit Court for the District of Kansas must be

Reversed, and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE GRAY and MR. JUSTICE SHIRAS, dissenting.

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint

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which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

The contract between the railway companies which the court holds to be void because it is found to violate the act of Congress of the 2d of July, 1890, 26 Stat. 209, substantially embodies only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret under-cutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the Interstate Commerce Commission, are secured against arbitrary and sudden changes. I content myself with giving this mere outline of the results of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of [344] the court rests upon that hypothesis. I commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and, second, that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it.

The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason

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as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The argument upon which it is held that the act forbids those reasonable contracts which are universally admitted to be legal is thus stated in the opinion of the court, and I quote the exact language in which it is there expressed, lest in seeking to epitomize I may not accurately reproduce the thought which it conveys:

"Contracts in restraint of trade have been known and [345] spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

To state the proposition in the form in which it was earnestly pressed in the argument at bar, it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word "some" for the word "every." If Congress had meant to forbid only restraints of trade which were unreasonable it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Is the proposition which is thus announced by the court, and which was thus stated at bar, well founded? is the first question which arises for solution. I quote the title and the

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first section of the act which, it is asserted, if correctly interpreted, destroys the right to make just and reasonable contracts:

[346] "An act to protect trade and commerce against unlawful restraints and monopolies.

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade"? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms every contract in restraint of trade. The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in 6 Year Book 5, 2 Hen. V, and is known as *Dier's case*. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of

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[347] the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of *Mitchel v. Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the House of Lords in *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Co.*, reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and if unreasonable it was.

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. Whilst the rule of partial and general restraint has been either expressly or impliedly admitted, the exact scope of the distinction between the two has been the subject of discussion and varying adjudication. And although it is accurate to say that in the cases expression may be found speaking of contracts as being in form, in restraint of trade and yet valid, it results from an analysis of all the American cases, as it does from the English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet considered as embraced within the definition of contracts in restraint of trade. On the contrary, the reason of the cases, where contracts partially restraining trade were excepted and hence held to be valid, was because they were not contracts in restraint of trade in the legal meaning of those words. Referring to the modern and Ameri- [348] can rule on the

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subject, Beach in his recent treatise on the Modern Law of Contracts, at section 1569, says:

"The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more *by exceptions and qualifications*, and a gradual change has taken place, brought about by the growth of industrial activities, and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment."

The fact that the exclusion of reasonable contracts from the doctrine of restraint of trade was predicated on the conclusion that such contracts were no longer considered as coming within the meaning of the words "restraint of trade," is nowhere more clearly and cogently stated than in the opinion of the Court of Appeals of the State of New York, in the case of *Matthews v. Associated Press of New York*, 136 N. Y. 333. In considering the contention that a by-law of the defendant association which prohibited its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose" was void, because it tended to restrain trade and competition and to create a monopoly, the learned judge said (p. 340):

"We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of a trade. The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. *The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground, both here and in England.* The [349] cases in this court which are the latest manifestations of the turn in the tide are cited in the opinion in this case at general term, and are *Diamond Match Co. v. Roeber*, 106 N. Y. 73; *Hodge v. Neill*, 107 N. Y. 244; *Leslie v. Lorillard*, 110 N. Y. 519.

"So that when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question *what is a restraint of trade in the modern definition of that term?* The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that *it is not in restraint of trade as the courts now interpret that phrase.*"

This lucid statement aptly sums up the process of reasoning by which partial and reasonable contracts came no longer

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to be considered as included in the words contracts in restraint of trade, and points to the fallacy embodied in the proposition that contracts which were held not to be in restraint of trade were yet covered by the words in restraint of trade; that is, that although they were not such contracts, yet they continued so to be. After analyzing the provisions of the by-law the opinion proceeds as follows (p. 341):

"Thus a by-law of the nature complained of would have a tendency to strengthen the association and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done. *Such an agreement would not be in restraint of trade*, although its direct effect might be to restrain to some extent the trade which had been done."

This adds cogency to the demonstration, and shows in the most conclusive manner that the words contracts in restraint of trade do not continue to define those contracts which are no longer covered by the legal meaning of the words.

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is [350] not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 68; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409. As it is unnecessary here to enter into a detailed examination of the cases, I append in the margin a reference to decisions of some of the state courts and to several writers on the subject of contracts in restraint of trade, by whom the doctrine is reviewed and the authorities very fully referred to.¹

It follows from the foregoing statement that at common

¹ *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 N. Y. 519, 533; *Beal v. Chase*, 31 Michigan, 490, 518; *National Benefit Co. v. Union Hospital Co.*, 45 Minnesota, 272; *Ellerman v. Chicago Junction Railways &c. Co.*, 49 N. J. Eq. 215, 217; *Richards v. Am. Desk &c. Co.*, 87 Wisconsin, 503, 514; Note to 2 Parsons on Contracts, p. 748; Note to *Angier v. Webber*, 92 Am. Dec. 751 (1867); Note to *Mitchel v. Reynolds*, 1 Smith's Leading Cases, 705, and Supplemental Note, 9th Am. ed. 716 (1888); Review of Cases by A. M. Eaton in 4 Harv. Law Review, p. 129 (1890); Patterson on Restraint of Trade (1891).

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law contracts which only partially restrain trade, to use the precise language of Maule, Justice, in *Rannie v. Irvine*, 7 Man. & G. 969, 978, were "*an exception engrafted upon that rule*," that is, the rule as to contracts in restraint of trade, "*and that the exception is in furtherance of the rule itself*." I submit, also, manifestly that the further development of the doctrine by which it was decided that if a contract was reasonable it would not be held to be included within contracts in restraint of trade, although such contract might, in some measure, produce such an effect, was also an exception to the general rule as to the invalidity of contracts in restraint of trade. The theory, then, that the words restraint of trade define and embrace all such contracts without reference to whether they are reasonable, amounts substantially to saying that, by the common law and the adjudged American cases, certain classes of contracts were carved out of and excepted from the general rule, and yet were held to remain embraced within the general rule from which they were removed. But the obvious conflict which is shown by this contradictory result to which the contention leads rests not upon the mere form of statement but upon the [351] reason of things. This will, I submit, be shown by a very brief analysis of the reasons by which partial restraints were held not to be embraced in contracts in restraint of trade, and by which ultimately all reasonable contracts were likewise decided not to be so embraced. That is to say, that the reasoning by which the exceptions were created conclusively shows the error of contending that the words contracts in restraint of trade continued to embrace those reasonable contracts which those words no longer described.

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that where contracts operated

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only a partial restraint of the freedom of contract or of trade they were not in contemplation of law contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been com- [352] pelled by the exigency of the premise upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "every contract in restraint of trade" embrace all such contracts, and yet at the same time be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the contracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained is either arbitrary or it is unreasonable.

But, admitting *arguendo* the correctness of the proposi-

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tion by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is "An act to protect trade and commerce against unlawful restraints and monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. In *United States* [353] v. *Palmer*, 3 Wheat. 610, where general language found in the body of a criminal statute was given a narrow and restricted meaning, Mr. Chief Justice Marshall, in the course of the opinion, said (p. 631): "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is 'An act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish."

So, also, in *United States v. Union Pacific Railroad*, 91 U. S. 72, where the construction of a statute was involved, it was held that the interpretation adopted was supported by the title, which disclosed the general purpose which Congress had in view in adopting the law under consideration. The same rule was announced in *Smythe v. Fiske*, 23 Wall. 374, 380, and *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, and cases there cited.

Pretermittting the consideration of the title, it cannot be

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denied that the words "restraint of trade" used in the act in question had long prior to the adoption of that act been construed as not embracing reasonable contracts. The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created. Thus in *United States v. Palmer* (*supra*), Mr. Chief Justice Marshall, referring to the term "robbery" as used in the statute, said (p. 630): "Of the meaning of the term 'robbery,' as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law."

[354] If these obvious rules of interpretation be applied, it seems to me they render it impossible to construe the words every restraint of trade used in the act in any other sense than as excluding reasonable contracts, as the fact that such contracts were not considered to be within the rule of contracts in restraint of trade, was thoroughly established both in England and in this country at the time the act was adopted. It is, I submit, not to be doubted that the interpretation of the words "every contract in restraint of trade," so as to embrace within its purview every contract, however reasonable, would certainly work an enormous injustice and operate to the undue restraint of the liberties of the citizen. But there is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute. In *Smythe v. Fiske*, 23 Wall. 374, 380, this court declared that "a thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." In *Lau Ow Bew v. The United States*, 144 U. S. 47,

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this court, speaking through Mr. Chief Justice Fuller, said (p. 59):

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity v. United States*, 143 U. S., 457; *Henderson v. Mayor of New York*, 92 U. S., 259; *United States v. Kirby*, 7 Wall., 482; *Oates v. National Bank*, 100 U. S., 239."

In all the cases there cited the literal language of the statute was disregarded, in order to restrict its operation within reason. To those cases may also be added *United States v. Mooney*, 116 U. S. 104, where it was contended that by the act of March 3, 1875, c. 137, the Circuit Courts were vested with jurisdiction concurrent with District Courts over certain suits. The plausibility of the argument, based upon the literal language of the statute, was conceded by the court, but the [355] results which would follow from sustaining the construction contended for were pointed out by the court, and it was observed (p. 107): "A construction which involves such results was clearly not contemplated by Congress."

Indeed, it seems to me there can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress and not reaction was the purpose of the act of Congress. The construction now

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given the act disregards the whole current of judicial authority and tests the right to contract by the conceptions of that right entertained at the time of the year-books instead of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy; for as said by Sir G. Jessel, Master of the Rolls, in *Printing &c. Company v. Sampson*, L. R. 19 Eq. 462, "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of Congress was to shield against the danger of contract or combination by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. *In re Debs*, 64 Fed. Rep. 724, 745-755; 158 U. S. 564. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom or by the progress which made reason the controlling factor on the subject. It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results not only frustrates the plain purpose intended to be accomplished by Congress, but also makes the statute

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tend to an end never contemplated, and against the accomplishment of which its provisions were enacted.

But conceding for the sake of argument that the words "every contract in restraint of trade," as used in the act of Congress in question, prohibits all such contracts however reasonable they may be, and therefore that all that great body of contracts which are commonly entered into between individuals or corporations and which promote and develop trade, and which have been heretofore considered as lawful, are no longer such; and conceding also that agreements entered into by associations of workingmen to peaceably better their condition either by obtaining an increase or preventing a decrease [357] of wages, or by securing a reduction in the hours of labor, or for mutually protecting each other from unjust discharge, or for other reasonable purposes, have become unlawful, it remains to consider whether the provisions of the act of 1890 were intended to apply to agreements made between carriers for the purpose of classifying the freight to be by them carried, or preventing secret cutting of the published rates; in other words, whether the terms of the statute were intended to apply to contracts between carriers entered into for the purpose of securing fairness in their dealings with each other and tending to protect the public against improper discrimination and sudden changes in rates. To answer this question involves deciding whether the act here relied upon was intended to abrogate the provisions of the act of Congress of the 4th of February, 1887, and the amendments thereto, commonly known as the Interstate Commerce Act. The question is not whether railway companies may not violate the terms of the statute of 1890 if they do acts which it forbids and punishes, but whether that statute was intended to abrogate the power of railway companies to make contracts with each other which are either expressly sanctioned by the Interstate Commerce Act or the right to make which arises by reasonable implication from the terms of that act; that is to say, not whether the act of 1890 is not operative upon all persons and corporations, but whether, being so generally operative, it was intended to forbid, as in restraint of trade, all contracts on the subjects embraced within and controlled by the interstate commerce law. The

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statute, commonly known as the Interstate Commerce Act, was a special act, and it was intended to regulate interstate commerce transported by railway carriers. All its provisions directly and expressly related to this subject. The act of 1890, on the contrary, is a general law, not referring specifically to carriers of interstate commerce. The rule is that a general will not be held to repeal a special statute unless there be a clear implication unavoidably resulting from the general law that it was the intention that the provisions of the general law should cover the subject-matter previously, expressly and specifically provided for by particular legislation. The doctrine on this [358] subject is thus stated in *Ex parte Crow Dog*, 109 U. S. 556, 570:

"'The general principle to be applied,' said Bovill, C. J., in *Thorpe v. Adams*, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald v. Champenys*, 30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31-54, 'that the legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterward to derogate from its own act when it makes no special mention of its intention so to do.'"

These principles thus announced are treated as elementary by the text writers. Endlich on Interpretation of Statutes, § 223; Sedgwick on Statutory Construction, §§ 157, 158; Sutherland on Statutory Construction, § 157.

Does, therefore, the implication irresistibly arise that Congress intended in the act of 1890 to abrogate, in whole or in part, the provisions of the act of 1887, regulating interstate commerce? It seems to me that the nature of the two enactments clearly demonstrates that there was no such intention. The act to regulate interstate commerce expressed the purpose of Congress to deal with a complex and particular subject which, from its very nature, required special legislation. That act was the initiation of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate transportation.

Conceding *arguendo* that the debates which took place at the time of the passage of the act of 1890 may not be resorted

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to as a means of interpreting its text, yet a review of the proceedings connected with the passage of the act of July 2, 1890, through the two houses of Congress, it seems to me, leaves no room for question that the act was not designed to cover the particular subjects which had been theretofore specially regulated by provisions of the interstate commerce law.

[359] Prior to the passage of the act of 1890, various reports had been made to Congress concerning the operations of the Interstate Commerce Act, in which the commission pointed out the desirability and necessity of contracts between railroad companies in the matter of classification, stable rates, etc. After the act of 1890 had been adopted in the Senate, it was amended in the House of Representatives so as to specifically include among the contracts declared lawful "contracts for the transportation of persons or property from one State or Territory into another." Cong. Rec. vol. 21, part 5, pp. 4099, 4144. On the return of the bill to the Senate the amendment was agreed to with the added provision that the contracts for transportation to be prohibited, "should only be such as raise the rates of transportation above what is just and reasonable." *Ib.* 4753. The House refused to concur in the Senate amendment. A conference committee was appointed by both bodies, which recommended that the House of Representatives recede from its disagreement to the amendments of the Senate and agree to the same, modified by the addition of the provision that "nothing in this act shall be deemed or held to impair the powers of the several States in respect to any of the matters in this act mentioned." In a statement accompanying the report, Mr. Stewart, for the conferees on the part of the House, said:

"A majority of the committee of conference on the part of the House on the disagreeing votes of the two Houses on Senate bill one, submit the following statement:

"In the original bill two things were declared illegal, namely: contracts in restraint of interstate trade or commerce, and the monopolization of such trade.

"Its only object was the control of trusts, so called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

"The House amendment extends the scope of the act to all agreements entered into for the purpose of preventing competition, either in the purchase or sale of commodities, or in the transportation of persons or property within the jurisdiction of Congress.

[360] "It declares illegal any agreement for relief from the effects

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of competition in the two industries of transportation and merchandising, however excessive or destructive such competition may be.

"The amendment reported by the conferees is the Senate amendment with the added proviso that the power of the States over the subjects embraced in the act shall not be impaired thereby.

"It strikes from the House amendment the clause relating to contracts for the purchase of merchandise, and modifies the transportation clause by making unlawful agreements which raise rates above what is just and reasonable." Cong. Rec., vol. 21, part 6, p. 5950.

The House rejected the report of the conference committee and adhered to its amendments. A new conference committee was appointed, and the recommendation of that committee that both houses recede was concurred in, and the bill as it originally passed the Senate was adopted. Cong. Rec. vol. 21, part 9, p. 6212.

It thus appears that the bill was originally introduced in the form in which it now appears; that this form was thought not to be sufficient to embrace railroad transportation, and that a determined effort was made by the proposed amendment to include such contracts, and that the effort was unsuccessful. The reports to Congress by the commission and by the conference committee being facts proper to be noticed in seeking to ascertain the intention of Congress, *Church of Holy Trinity v. United States*, 143 U. S. 457, it would seem to be manifest therefrom that there was no intention by the act to interfere with the control and regulation of railroads under the Interstate Commerce Act or with acts of the companies which had therefore been recognized as in conformity to and not in conflict with that act.

That there was and could have been no intention to repeal by the act of 1890 the earlier "act to regulate interstate commerce" is additionally evidenced by the fact that no reference is made in the later act to the prior one, and that no language is contained in the act of 1890 which could in any way be construed as abrogating any of the rights conferred or powers called into existence by the Interstate Commerce Act. Nowhere, contemporaneous with the act of 1890, is there anything indicating that any one supposed that the provisions of that act were intended to repeal the Interstate Commerce Act. The understanding of Congress in this respect is shown by the circumstance that the Interstate Commerce Act has been amended in material particulars and treated as existing since the adoption of the act of 1890; and this conception of the

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legislative department of the Government has also been that entertained by the executive and judicial departments, evidenced by the appointment of new members of the commission, and by decisions of the courts enforcing various provisions of that act, and treating it as still subsisting in its entirety. The two laws then coexisting—is the agreement of the carriers to secure a uniform classification of freight and to prevent secret changes of the published rates, in other words, to secure just and fair dealings between each other, sanctioned by the act to regulate interstate commerce, and, therefore, not within the inhibition of the act of 1890?

The Interstate Commerce Act provided for the appointment of a commission to whom was to be confided the supervision of the execution of the law. Without going into detailed mention of the provisions of the statute, I adopt and quote the summary statement of the leading features of the original act contained in the first annual report made to Congress by the commission, as required by the act. It is as follows:

"All charges made for services by carriers subject to the act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be unlawful.

"The direct or indirect charging, demanding, collecting or receiving for any service rendered a greater or less compensation from any one or more persons than from any other for a like and contemporaneous service, is declared to be unjust discrimination and is prohibited.

"The giving of any undue or unreasonable preferences, as between persons or localities, or kinds of traffic, or the subject [362] ing any one of them to undue or unreasonable prejudice or disadvantage, is declared to be unlawful.

"Reasonable, proper and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding and delivering of passengers and property between connecting lines is required, and discrimination in rates and charges as between connecting lines is forbidden.

"It is made unlawful to charge or receive any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

"Contracts, agreements or combinations for the pooling of freights of different and competing railroads, or for dividing between them the aggregate or net earnings of such railroads or any portion thereof, are declared to be unlawful.

"All carriers subject to the law are required to print their tariffs for the transportation of persons and property, and to keep them for public inspection at every depot or station on their roads. An advance in rates is not to be made until after ten days' public notice, but a reduction in rates may be made to take effect at once, the notice of the same being immediately and publicly given. The rates publicly

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notified are to be the maximum as well as the minimum charges which can be collected or received for the services respectively for which they purport to be established.

"Copies of all tariffs are required to be filed with this commission, which is also to be promptly notified of all changes that shall be made in the same. The joint tariffs of connecting roads are also required to be filed, and also copies of all contracts, agreements or arrangements between carriers in relation to traffic affected by the act.

"It is made unlawful for any carrier to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination."

[363] These provisions substantially exist in the act as now in force, except that by an amendment made March 2, 1889, it was provided that rates should not be reduced by carriers except upon three days' public notice of an intention so to do.

This summary of the act, which omits reference to a number of its provisions relating to the power of the commission and the mode in which these powers are to be exercised, will suffice for an examination of the matter in hand.

Now, a consideration of the terms of the statute, I submit, makes it clear that the contract here sought to be avoided as illegal is either directly sanctioned or impliedly authorized thereby. That the act did not contemplate that the relations of the carrier should be confined to his own line and to business going over such line alone, is conclusively shown by the fact that the act specifically provides for joint and continuous lines; in other words, for agreements between several roads to compose a joint line. That these agreements are to arise from contract is also shown by the fact that the law provides for the filing of such contracts with the commission. And it was also contemplated that the agreements should cover joint rates, since it provides for the making of such joint tariffs and for their publication and filing with the commission. The making of a tariff of this character includes necessarily agreements for the classification of freight, as the freight classification is the essential element in the making up of a rate. That the interstate commerce rates, all of which are controlled by the provisions as to reasonableness, were not intended to fluctuate hourly and daily as competition might ebb and flow, results from the fact that the published rates could not either be increased or reduced,

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except after a specified time. It follows, then, that agreements as to reasonable rates and against their secret reduction conform exactly to the terms of the act. Indeed, the authority to make agreements on this subject not only results from the terms of the act just referred to, but from its mandatory provisions forbidding discrimination against or preference to persons and places. The argument that these provisions referred to joint lines alone and not to competitive lines is without force; since joint rates necessarily relate to and [364] are influenced by the rates on competitive lines. To illustrate, suppose three joint lines of railroads between Chicago and New York, each made up of many roads. How could a joint rate be agreed on by the roads composing one of these continuous lines, without an ascertainment of the rate existing on the other continuous line? What contract could be made with safety for transportation over one of the lines without taking into account the rate of all the others? There certainly could be no prevention of unjust discrimination as to the persons and places within a given territory, unless the rates of all competing lines within the territory be considered and the sudden change of the published rates of all such lines be guarded against.

I do not further elaborate the reasons demonstrating that classification is essential to rate making, and that a joint rate to be feasible must consider the competitive rates in the same territory, since these propositions are to me self-evident, and their correctness is substantiated by statements found in the reports of the Interstate Commerce Commission to Congress, of which reports judicial notice may be taken. *Heath v. Wallace*, 138 U. S. 573, 584.

I excerpt from some of these reports of the commission to Congress statements bearing on these subjects, as well as other statements indicating that agreements among carriers, competitive as well as connecting, for the purpose of securing a uniform classification and preventing of undercutting of rates, underbilling, etc., existed prior to the Interstate Commerce Act, were continued thereafter, and were deemed not to be forbidden by law, but, on the contrary, were considered as instruments tending to secure its successful evolution. Whilst it is doubtless true that in a recent report the com-

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mission, as now constituted, has said that agreements between competitors to prevent the undercutting of rates may operate to cause carriers to disregard the lawful orders of the commission, this fact does not change the legal inference to be deduced from the construction placed upon the law by those charged with its administration in the period immediately following its adoption and which was then reported to Congress.

[365] On the subject of relative rates, the commission, at page 39 of their first annual report said: "Questions of rates on one line or at one point cannot be considered by themselves exclusively; a change in them may affect rates in a considerable part of the country. . . . Just rates are always relative; the act itself provides for its being so when it forbids unjust discrimination as between localities." That is to say, if one continuous line made joint rates and fixed and published them, and the other then made a different rate, not only would the first joint rate be injurious to the interests of the railroads making it, during the period in which it could not be changed, but would also be against the interests of the public and of those who had contracted to ship, since it would create among shippers and the receivers that inequality which it was the express purpose of the act to prevent.

In the same report of the commission, at page 33, not only the expediency but the necessity of contractual relations between railroad companies is pointed out in the following language:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements, an interchange of cars and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and even if they were not, could be best settled and all the incidents and qualifications fixed by the voluntary action of the parties in control of the roads respectively."

Also at page 35, after referring to the fact that the former railroad associations had been continued in existence since the enactment of the interstate commerce law, though pooling had been prohibited, among other objects, for the "making of regulations for uninterrupted and harmonious railroad communication and exchange of traffic within the territories embraced by their workings," the commission observed

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that "some regulations in addition to those made by the law are almost if not altogether indispensable."

On the same page the fact is emphasized that classification had not been taken, by the act, out of the hands of the carriers, [366] and it was observed that classification was best made by the joint action of the railroads themselves. In its second annual report the commission, in commenting upon the evils arising from the want of friendly business relations between railroads and the injury that a short road might cause by simply abstaining from extending accommodation that could not be lawfully forced from it, said (p. 28):

"The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibility, just as far as may be possible, so that the public may have in the service performed all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers, as well as to the public, and their voluntary extension may be looked for until in the strife between the roads the limits of competition are passed and warfare is entered upon. But in order to form them great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

At page 29 of the report the existence of traffic arrangements between railroads is called to the attention of Congress in the following language:

"While the commission is not at this time prepared to recommend general legislation towards the establishment and promotion of relations between the carriers that shall better subserve the public interest than those that are now common, it must nevertheless look forward to the possibility of something of that nature becoming at some time imperative, unless a great improvement in the existing condition of things is voluntarily inaugurated."

So, also, the existence of traffic associations, between competitive roads, for purposes recognized by the act as lawful, [367] and their favorable tendency seems to be conceded in the fourth annual report of the commissioners, where, at page 29, it is said:

"If the regulations which are established by the railroad associations were uniformly, or even generally, observed by their members, respectively, there would be little difficulty in enforcing a rule of reasonable rates, for the competition between the roads which even then would exist would be such as would prevent the establishment

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of rates which are altogether unreasonable, and the public would not be likely to complain if they were satisfied that the rate sheets were observed."

The character of associations such as that under consideration is alluded to at page 26 of the same report, where, in discussing the subject of how best to secure a unity of railroad interests, it was observed "without legislation to favor it little can be done beyond the formation of consulting and advisory associations, and the work of these is not only necessarily defective, but it is also limited to a circumscribed territory."

The significance of the statement that to obtain uniformity of classification, a result most desirable for the best interests of the public, agreements between the railroads themselves was essential, is apparent from the fact, frequently declared by the commission in its reports, that uniformity of classification is one of the prerequisites of uniformity of rates. 1 Ann. Rep. 30, 35; 2 Ann. Rep. 40; 3 Ann. Rep. 51, 52; 4 Ann. Rep. 32. The very great importance of uniform and stable rates has also frequently been reiterated in the reports of the commission. Thus, at page 6 of the first annual report, in reviewing the causes which led to the adoption of the Interstate Commerce Act, it is said:

"Permanence of rates was also seen to be of very high importance to every man engaged in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of the money charges exacted for transportation, if not clearly beyond the bounds of reason, was of inferior importance in comparison with the obtaining of rates that should be open, equal, relatively just [368] as between places and as steady as in the nature of things was practicable."

That unstable rates between competing carriers lead to injurious discrimination, one of the evils sought to be remedied by the act, was mentioned in the same report at pages 36 and 37, in connection with a discussion of the subject of reasonable charges, in the following language:

"Among the reasons most frequently operating to cause complaints of rates may be mentioned: the want of steadiness in rates. . . . More often, perhaps, growing out of disagreements between competing companies, which, when they become serious, may result in wars of rates between them. Wars of rates, when mutual injury is the chief purpose in view, as is sometimes the case, are not only mischievous in their immediate effects upon the parties to them, and upon the business community whose calculations and plans must for a time be

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disturbed, but they have a permanently injurious influence upon the railroad service because of their effect upon the public mind."

The evil effects of shifting rates was also treated of at page 22 of the second annual report, where the commission inserted a letter received from a business man of Kansas City, not connected with railroads, who said:

"The frequent and violent changes in railway rates which have taken place during the past few years and which seem likely to be unabated, seems to me to call for new legislation in the way of amendment of the interstate commerce bill. These changes are ruinous to all business men, as well as the railways, and are the cause of great discontent among shippers everywhere, and especially to the farmers. What is needed is a fixed permanent rate, which shall be reasonable, and which can be counted upon by any one engaging in business."

So, also, in the fourth annual report it was observed that shifting, unstable rates, by competing roads, was contrary to the purpose of the Interstate Commerce Act, and hampered the operations of the commission. It was said at page 21:

[369] "In former reports the commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and the most serious difficulty in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of existing law is against them."

In addition to the text of the law heretofore commented on, the section which forbids pooling adds cogency to the construction that the law could not have been intended to forbid contracts between carriers for the purpose of preventing the doing of those things which the law forbade. For, as I have said, it cannot be denied that at the time of the passage of the act there existed associations and contracts between carriers for other purposes than the pooling of their earnings. Whilst the exact scope of these contracts is not shown, the fact that their existence was considered by Congress results from the face of the act, since it requires that agreements and contracts between carriers shall be filed with the commission. Moreover, the earlier reports of the commission, as I have shown, refer to such traffic agreements, and state that after the passage of the act they continued to exist as they had existed before eliminating only the pooling feature.

In view of these facts, when the act *expressly forbids con-*

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tracts and combinations between railroads for pooling, and makes no mention of other contracts, it is clear that the continued existence of such contracts was contemplated, and they are not intended to be forbidden by the act. The elementary rule of *expressio unius* entirely justifies this implication.

And it is, I submit, no answer to this reasoning to say that the record does not show the terms of these contracts, since judicial notice may be taken of the reports made by the commission to Congress, from which reports the nature of the contracts is sufficiently pointed out to authorize the conclusion that they were of the general character of the one here assailed.

Whilst the excerpts from the reports of the commission which have been heretofore made, serve to elucidate the text [870] of the act, they also, I submit, constitute a contemporaneous construction of the provisions of the act made by the officers charged with its administration, which is entitled to very great weight. *Brown v. United States*, 113 U. S. 568, 571, and cases there cited.

The rule sustained by these authorities receives additional sanction here, from the fact that the construction at the time made by the commission was reported to Congress, and the act was subsequently amended by that body without any repudiation of such construction.

It is, I submit, therefore not to be denied that the agreement between the carriers, the validity of which is here drawn in question, seeking to secure uniform classification and to prevent the undercutting of the published rates, even though such agreements be made with competing as well as joint lines, is in accord with the plain text of the Interstate Commerce Act, and is in harmony with the views of the purposes of that law contemporaneously expressed to Congress by the body immediately charged with its administration, and tacitly approved by Congress.

But, departing from a consideration of the mere text and looking at the Interstate Commerce Act from a broader aspect, in order to discover the intention of the lawmaker and to discern the evils which it was intended to suppress and the remedies which it was proposed to afford by its enactment, it

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seems to me very clear that the contract in question is in accord with the act and should not be avoided.

It cannot be questioned that the Interstate Commerce Act was intended by Congress to inaugurate a new policy for the purpose of reasonably controlling interstate commerce rates and the dealings of carriers with reference to such rates. Two systems were necessarily presented: the one a prohibition against the exaction of all unreasonable rates and subject to this restriction, allowing the hourly and daily play of untrammelled competition, resulting in inequality and discrimination; the other imposing a like duty as to reasonable rates, and whilst allowing competition subject to this limitation, preventing the injurious consequences arising from a [371] constant and daily change of rates between connecting or competing lines, thus avoiding discrimination and preference as to persons and places.

The second of these systems is, I submit, plainly the one embodied in the Interstate Commerce Act. At the outset reasonable rates are exacted, and the power to strike down rates which are unreasonable is provided. In the subsequent provisions discrimination against persons and against places to arise from daily fluctuations in rates is guarded against by requiring publication of rates and forbidding changes of the published rates, whether by way of increase or reduction during a limited time. To hold, then, the contract under consideration to be invalid when it simply provides for uniform classification, and seeks to prevent secret or sudden changes in the published rates, would be to avoid a contract covered by the law and embodied in its policy. It cannot, I think, be correctly said that whilst the avowed purpose of the contract in question embraced only the foregoing objects, its ulterior intent was to bring about results in conflict with the interstate commerce law. The answers to the bill of complaint specially denied the allegations as to the improper motives of the parties to the contract, and also expressly averred their lawful and innocent intention. As the case was heard upon bill and answer, improper motives cannot therefore be imputed. Indeed, the opinion of the court sustains this view, since it eliminates all consideration of improper motives and

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holds that the validity of the contract must depend upon its face, and deduces as a legal conclusion from this premise that the contract is invalid, because even reasonable contracts are embraced within the purview of the act of 1890. To my mind, the judicial declaration that carriers cannot agree among themselves for the purpose of aiding in the enforcement of the provisions of the interstate commerce law, will strike a blow at the beneficial results of that act, and will have a direct tendency to produce the preferences and discriminations which it was one of the main objects of the act to frustrate. The great complexity of the subject, the numerous interests concerned in it, the vast area over which it [372] operates, present difficulties enough without, it seems to me, its being advisable to add to them by holding that a contract which is supported by the text of the law is invalid, because, although it is reasonable and just, it must be considered as in restraint of trade.

Nor, do I think that the danger of these evil consequences is avoided by the statement that if the contract be annulled, these dangers will not arise, because experience shows that contracts such as that here in question, when entered into by railroads, are never observed, and therefore it is just as though the contract did not exist. How, may I ask, can judicial notice be taken of this fact, when it is said that judicial notice cannot be taken of the fact that there are such contracts? How, moreover, may I ask, can it be said on one branch of the case that the contract, although reasonable, must be avoided, because it is a contract in restraint of trade, and then on the other branch declared that contracts of that character never do restrain trade because they are never carried out between the parties who enter into them?

There is another contention which, I submit, is also unsound, that is the suggestion that it is impossible to say that there can be such a thing as a reasonable contract between railroads seeking to avoid sudden or secret changes in reasonable rates because the question of railroad rates is so complex and is involved in so much difficulty that to say that a rate is reasonable is equivalent to saying that it must be fixed by the railroads themselves, as no mind outside of the officials of

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the particular roads can determine whether a rate is reasonable or not. But this proposition absolutely conflicts with the methods of dealing with railroad rates adopted in England and expressly put in force by Congress in the Interstate Commerce Act and by many of the States of the Union. For years, the rule in England was reasonable rates enforced by judicial power, and subsequently by enactment securing such reasonable rates by administrative authority. The Interstate Commerce Act especially provides for reasonable rates, and vests primarily in the commission, and then in the courts the power to enforce the provision and like machinery is provided [373] in many of the States. Will it be said that Congress and other legislative bodies have provided for reasonable rates and created the machinery to enforce them, when whether rates are reasonable or not is impossible of ascertainment? If this proposition be correct, what, may I ask, becomes of the judgment of this court in *Cincinnati, New Orleans &c. Railway Co. v. Interstate Commerce Commission*, 162 U. S. 184, where it is held that the order of the commission finding certain rates charged by a railroad to be unreasonable was correct?

In conclusion, I notice briefly the proposition that though it be admitted that contracts, when made by individuals or private corporations, when reasonable, will not be considered as in restraint of trade, yet such is not the case as to public corporations, because any contract made by them in any measure in restraint of trade, even when reasonable, is presumptively injurious to the public interests, and therefore invalid. The fallacy in this proposition consists in overlooking the distinction between acts of a public corporation which are *ultra vires* and those which are not. If the contract of such a corporation which is assailed be *ultra vires*, of course the question of reasonableness becomes irrelevant, since the charter is the reason of the being of the corporation. The doctrine is predicated on the following expressions taken from the opinion of the court expressed by Mr. Chief Justice Fuller in *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 408:

"That in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interests, courts decline to enforce or sustain con-

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tracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 West Va. 600; *Chicago &c. Gas Co. v. People's Gas Co.*, 121 Illinois, 530; *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Georgia, 160."

But, manifestly, this language must be construed with reference to the facts of the case in which it was used. What the facts were in that case is shown by the statement in the [374] opinion (p. 406) that the contract there considered "was an agreement for the abandonment by one of the companies of the discharge of its duties to the public." It is also to be remembered that it was this character of contract, that is, one which was *ultra vires*, which was held to be illegal in the West Virginia, Illinois and Georgia cases, which were cited in the *Gibbs case* in support of the excerpt just quoted. That the language in the *Gibbs case* referred to conditions of fact like that there passed upon, that is, contracts *ultra vires*, is shown by the subsequent case of *Chicago &c. Railway Co. v. Pullman Car Co.*, 139 U. S. 79, where a contract of the railway company was assailed as in restraint of trade, and the court held that although by the contract the company had restrained itself for a long period of years from using other than certain drawing room and sleeping cars, the contract was yet a valid and proper contract. Manifestly, this decision is utterly irreconcilable with the view that in the case of a railroad company, every restraint imposed by contract upon its freedom of action is necessarily injurious to the public interests, and hence invalid. Indeed, the proposition that any restraint of its conduct which a railroad may create by contract is invalid, because such road is a public corporation, is demonstrated to be erroneous by the Interstate Commerce Act, which, in the provisions heretofore referred to, not only expressly authorizes, but in some instances, commands agreements from which restraint of the action of the corporation necessarily arises.

I am authorized to say that MR. JUSTICE FIELD, MR. JUSTICE GRAY, and MR. JUSTICE SHIRAS concur in this dissent.

Syllabus.

[529] UNITED STATES *v.* HOPKINS ET AL.*

(Circuit Court, D. Kansas, First Division. September 20, 1897.)

[82 Fed., 529.]

MONOPOLIES AND RESTRAINTS OF TRADE.—In a suit to restrain alleged violations of the law of July 2, 1890, against trusts and monopolies affecting interstate commerce, the existence of an illegal combination among the defendants is to be determined not alone from what appears on the face of the preamble, rules, and by-laws of their association, but from the entire situation, and the practical working and results of their methods of doing business, as disclosed by the evidence.^b

SAME—LIVE-STOCK EXCHANGE.—The defendants were members of a voluntary, unincorporated exchange or association at Kansas City, and had agreed to be bound by its articles of association, rules, and by-laws. Their business consisted in receiving, buying, selling, and handling, as commission merchants, live stock received at the Kansas City stock yards from, and sold for shipment to, various states and territories. These stock yards furnished the only available public market for that purpose for an exceedingly large area, including many states and territories. One of the rules of the association fixed a minimum rate of commissions to be charged by members of the association, and prohibited the employment, by any commission firm or corporation, of more than three persons to travel and solicit business, and prohibited the sending of prepaid telegram or telephone messages quoting the markets; and another rule shut out all dealings and business intercourse between members and nonmembers. Persons attempting to carry on business without joining the exchange were systematically blacklisted and boycotted, and thus effectually prevented from securing or transacting business. *Held*, that the association was an illegal combination to restrict, monopolize, and control that class of trade and commerce.

SAME—REASONABLENESS OF RESTRAINTS.—The act of congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial.

COMMERCE BETWEEN THE STATES.—The fact that the place of business of an association is located upon both sides of the line dividing two

* Appealed to the Circuit Court of Appeals, Eighth Circuit, and removed to the Supreme Court on writ of certiorari (84 Fed., 1018). Memorandum notation. See p. 748. Reversed by Supreme Court, with directions to dismiss the bill (171 U. S., 578). See p. 941.

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states is in itself of no material importance in determining whether the business transacted by it is commerce between the states.

SAME.—The shipments of live stock from growers, dealers, and traders in various states and territories to the defendants was solicited by the latter chiefly through personal solicitation of travelling agents, and through advertisements. The course of business involved frequent loans to shippers in other states, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other states on the strength of bills of shipment attached thereto. Shipments were made to Kansas City, and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers. Sales at Kansas City were made for shipment to markets in other states, as well as for slaughter at packing houses near by. The traffic was of immense proportions, and defendants were active promoters, and frequently interested parties, and gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation. *Held*, that defendants were engaged in commerce between the states, and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies.

SUBJECTS OF INTERSTATE COMMERCE.—The live stock shipped to defendants from other states through their solicitation and procurement, to be sold to a large extent for reshipment to [530] other states, or, if the market should be unsatisfactory, for reshipment for sale at markets in other states, does not cease to be the subject of interstate commerce as soon as it reaches Kansas City or is there unloaded, nor until it has been so acted upon that it has become incorporated and mingled with the mass of property in the state.

SAME—SUBJECTS OF INTERSTATE COMMERCE.—Live stock shipped from various states to the yards of a stock-yards association in another state, by the solicitation and procurement of the members thereof, to be there sold, or to be reshipped to other states, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded, nor until it has been further acted upon so as to become mingled with the mass of property in the state.

The bill in this case is presented under the act of congress of July 2, 1890 (26 Stat. 209).

It charges that each of the defendants, about 300 in number, are members of a voluntary, unincorporated association, known and designated as the "Kansas City Live-Stock Exchange," and have adopted articles of association and rules and by-laws whereby they have agreed that they will faithfully observe and be bound by the same; that the government of said association is vested in a board of 11 directors, and its officers, consisting of a president, vice president, secretary, and treasurer; its place of business is in a building situated on the line be-

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tween the states of Missouri and Kansas, and that defendants transact business partly in one state and partly in the other; that substantially all of the business transacted in the matter of receiving, buying, selling, and handling live stock at the Kansas City Stock Yards is carried on by defendants and other members of said exchange, as commission merchants; that a large proportion of such live stock is shipped from the states of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa, and Arkansas, and the territories of Oklahoma, Arizona, and New Mexico, and is sold by the defendants to the various packing houses in Kansas City Mo., and Kan., and also for shipment to other markets; that a vast number of live stock is thus annually received and sold; that said Kansas City market is a public market, and supplies a large number of packing houses in Kansas City, Kan., and Kansas City, Mo., and other cities in different states of the Union; that the Kansas City market, next to Chicago, is the largest live-stock market in the world; that, under the practice and custom at said yards, the live stock there received is delivered to commission merchants, who receive, handle, sell, or reship the same for the consignors and owners thereof to other states and territories, charging a commission for their services; that, in the course of business at said yards, said stock is moved and shifted from one state to the other, according to the convenience of said Kansas City Stock-Yards Company; that a large portion of said stock is incumbered by mortgages, executed by the owners thereof to the defendants, members of said exchange, who advance large sums of money to growers and owners of cattle to provide the means to feed and prepare it for the market; that, when such cattle are ready for shipment, they are consigned to the defendants and other members of said exchange, who have made such advancements, and the amount thereof and interest is deducted from the proceeds of sale; that 90 per cent. of the members of said exchange make such advancements; that said stock yards accord to owners and shippers of live stock the only available means at that place for handling, selling, and reshipping live stock; that, by reason of its situation, said Kansas City Stock Yards are the only available public market for the purchase and sale of live stock for an exceedingly large territory of the United States, and the only available means for the exchange of interstate traffic between the states and territories named, the stock being sold in said yards to be shipped to other states of the Union; that it is the custom among a large number of cattle growers and shippers who consign live stock to the Kansas City Stock Yards to draw drafts on the commission merchants to whom such stock is consigned, and, attaching the bill of lading issued by the carrier therefor, to draw money on said drafts from local banks, and, when presented to the consignees, said drafts are paid by [531] them in Kansas and Missouri, and the proceeds remitted to the banks in the various towns and cities where the live stock was shipped; that by reason of the fact that said yards are in the states of Missouri and Kansas, and the live stock handled and sold therein is at times in Kansas, and at others in Missouri, and are transported from different states to be sold and shipped to other states, said business is interstate in character, and can only be controlled by federal legislation, as a part of commerce between the states. The bill further charges that, if the person or partnership to whom live stock is consigned at Kansas City is not a member of said exchange, he is not permitted to sell or dispose of such live stock on the Kansas City market, for the reason that the defendants and all other commission merchants doing and controlling the business at said yards are required by the rules of said exchange to refuse to buy live stock or in any manner deal with a person who is not a member of said exchange, and in all

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such cases the owner of the live stock is compelled to reship the same to some other market, and, by reason of said unlawful combination, is prevented from delivering said live stock to the Kansas City Stock Yards; and the sale of the same is thereby hindered and delayed, extra expense and loss entailed to the shipper, and an obstruction placed upon the marketing of such live stock; that among other rules for the government of said exchange are the following:

"RULE IX.—*Commissions.*

"Section 1. The commissions charged by members of this association for selling live stock shall not be less than the following named rates:

"Sec. 2. Six dollars per car load for single-deck car loads of hogs or sheep, and ten dollars per car load for double-deck car loads of the same: provided, members of this exchange may, after charging commissions as above provided, pay a regular sheep salesman on these yards a sum of money contingent on number of sheep sold. Said sheep salesman may be in the employ of other members of the exchange.

"Sec. 3. Fifty cents per head for cattle of all ages. In car loads of twenty-four or more, not more than twelve dollars per car load; ten dollars per single-deck car loads, and eighteen dollars per double-deck car load of veal calves.

"Sec. 4. Fifty cents per head for cattle, and twenty-five cents per head for calves, and ten cents per head for hogs and sheep in mixed car loads, but not to exceed twelve dollars per car load. Fifty cents per head for cattle and twenty-five cents per head for calves driven into the yards; and ten cents per head for hogs and sheep for sixty head or less. More than that number shall be charged for at car load rates.

"Sec. 5. Fifty cents per head for buying cattle for stockers or feeders: provided, such charges shall not exceed twelve dollars per car load. Six dollars per single-deck car load for buying sheep, and ten dollars per double-deck car load. All purchases paid for by a commission house or shipping clearance made by same shall be deemed a purchase, and charged for as above provided.

"Sec. 6. Not less than four dollars per single-deck and five dollars per double-deck car load for buying live hogs, and not less than three cents per head for hogs bought by the head.

"Sec. 7. No member or commission firm or corporation represented herein shall do business for a yard trader or speculator on this market for less charges than one-half the regular commission.

"Sec. 8. No firm shall handle the business of a nonresident commission house for less than full commissions, except said consignments be made direct to said nonresident commission house from one of the following named markets: Chicago, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Omaha, Nebraska; Wichita, Kans.; Denver, Colo.; Pueblo, Col.; St. Joseph, Mo.; Sioux City, Ia.; Peoria, Ill.; Milwaukee, Wis.; and Ft. Worth, Tex.

"Sec. 9. No member of this exchange or firm or corporation represented herein shall cause or allow to be shipped in his or its name any kind of live stock for the purpose of violating any of the provisions of this rule.

"Sec. 10. No agent, solicitor, or employé shall be hired except upon a stipulated salary, not contingent upon commissions earned (save as provided in section 2 of this rule). No solicitor shall be employed except as a bona fide traveling agent, who shall not solicit consignments local to his own neighbor- [532] hood only, nor to secure his individual trade. Nor shall any agent, solicitor, or employé be hired who

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is employed by any other party or parties, or who is actively engaged in other business (save as provided in section 2 of this rule). Members of this exchange must file with the secretary, within five days of employment, the names and addresses of their solicitors. More than three solicitors shall not be employed at one time by a commission firm or corporation. Members of a commission firm or corporation—resident or nonresident of Kansas City—may travel as solicitors, but must be registered as one of the three allowed each firm or corporation. It shall be a violation of this rule for any solicitor representing or claiming to represent a commission firm or corporation in any other market to solicit for any Kansas City firm; and members shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, solicits for a Kansas City firm or corporation.

"Sec. 11. Any member of this association or firm or corporation represented herein, sending or causing to be sent a prepaid telegram or telephone message quoting the markets, giving information as to the condition of the same, shall be fined not less than \$100 nor more than \$500. If said fine be not paid within three days, said firm or member shall be suspended until said fine is paid; provided, however, that prepaid messages may be sent to shippers quoting actual sales of their stock on the day made; also, to parties desiring to make purchases on this market.

"Sec. 12. Any member of this exchange or firm or corporation in which he may be a partner, violating any of the provisions of this rule, shall be fined not less than \$500, nor more than \$1,000, for the first offense. If said fine be not paid within three days, said member or firm may be suspended from membership until same is paid. For a second offense, said member or firm may be expelled from membership in the exchange.

"Sec. 13. From such fines and special assessments, the exchange shall pay a reward of \$500 to any party or parties furnishing sufficient evidence to convict any member of a violation of any of the provisions of this rule, and said reward shall be paid immediately after conviction.

"Sec. 14. For the purpose of making effective section 12 of this rule, when the treasurer shall not have on hand from fines collected the sum of \$500, the directors shall levy a special assessment, pro rata, on each commission firm or corporation buying or selling live stock in this market who is a member of the exchange; and they shall continue to levy such special assessments in such amounts as will keep a fund of \$500 constantly on hand for this purpose. Said fund shall be kept as a special fund, and shall be used for no other purpose.

"Sec. 15. Each firm or corporation represented in this exchange shall be held responsible for any violation of this rule by any party doing any portion of a commission business in its name, and any penalty imposed for violation of the foregoing shall be on account of such party. If not paid within three days, the firm or corporation doing said business shall sever its business connections with such party within ten days. No firm or corporation shall thereafter do any business for such party until said fine is paid.

"RULE XVI.—Limitations.

"Section 1. No member of the Kansas City Live-Stock Exchange shall transact any business with any person violating any of the rules or regulations of this exchange, or an expelled or suspended member, after notice of such violation, suspension, or expulsion has been issued by the secretary or board of directors of the exchange."

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The bill further charges that the defendants, by the adoption of said articles of association, have confederated and conspired together in violation of the laws of the United States, and particularly of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and to monopolize the business of buying and selling live stock at the Kansas City market, and to illegally fix and establish a minimum price for buying and selling the same, and have further, in restraint of trade and commerce between the states, confederated together to prevent and restrain the free transmission of information regarding the state of the market by telegraphic messages, and have restricted the free employment of agents and solicitors in the prosecution of business at said stock yards; that [533] the purpose of defendants in organizing said exchange is to prevent the shipment of any live stock to the Kansas City market, unless shipped to the Kansas City Stock Yards, and to defendants or other members of said exchange, and the further purpose was to compel shippers to pay to defendants and their associates the commissions provided for in rule 9, and to prevent the shipment and sale of property on said market unless such commissions were so paid. The bill further charges that it was also the purpose of said defendants and their associates to monopolize the business of receiving, handling, and selling live stock received at said market, and also to prevent its sale by any person not a member of said exchange, and to obstruct and retard the owners of such live stock in the sale of the same on the market at Kansas City. Thereupon the complainant prays for a decree dissolving said exchange, and for an injunction against said defendants, restraining them from enforcing or acting pursuant to the rules and by-laws of said association.

The defendants, for answer to said bill, admit the organization of said defendants into an association known as the "Kansas City Live-Stock Exchange," and aver that similar associations, under the names of "Boards of Trade" or "Exchanges," exist in practically every city of importance in the United States, devoted to the buying and selling of stocks, bonds, grain, live stock, petroleum, and all other products, with similar rules for government and transaction of business, in order that competition between the members may be fair and reasonable; that said methods are sanctioned by the experience of the commercial world, and tend to develop trade and commerce, and not to restrict the same. The preamble of their organization is as follows: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business, have associated, ourselves together, under the name of 'Kansas City Live-Stock Exchange,' and hereby agree each with the other that we will faithfully observe and be bound by the following rules and by-laws, and such new rules, additions, or amendments as may from time to time be adopted in conformity with the provisions thereof, from the date of organization, by the election of a board of directors and other officers, as prescribed by rule 1." The defendants deny that through their membership substantially all of the business of buying and selling live stock at Kansas City is carried on. On the contrary, any person desiring to sell live stock at said city is under no obligation to employ a commission merchant, but is at full liberty to act for himself, and the stock-yards company extends to such person all the privileges and facilities afforded by it; and persons desiring to purchase live stock at the yards may, and they constantly do, purchase direct

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from the owners and very much the largest part of the cattle purchased for feeding is bought without the employment of any commission merchant. The only restriction upon members of the exchange is that contained in rule 16, viz. that they will not deal with a person as a commission merchant who violates the rules of the exchange, or who is a suspended or expelled member thereof. It is further averred that the Kansas City market is not a public market, but is of a private character merely. Defendants further aver that with the exception of the firm of Greer, Mills & Co., which was first suspended from membership in the exchange for nonpayment of a fine imposed for a violation of the rules thereof, and which subsequently voluntarily withdrew from said exchange, all of the commission merchants at said yards are members of the exchange. Defendants further aver that, whenever drafts are drawn on a commission merchant, they are paid either at the place where payable by the terms thereof, or on presentation to the drawee; and that such place of payment is either in the state of Kansas or Missouri, according as the particular transaction is closed. Defendants are informed by counsel, and believe, that the exercising of their occupation is not commerce between the states, within the meaning of the constitution or laws of the United States; that it is not true that a consignor of live stock is not permitted or cannot sell the same at said yards, or that the members of said exchange refuse to deal with a nonmember thereof. It is not true that any person shipping live stock to said yards, and refusing [534] to employ a member of said exchange, is compelled to reship the same to some other market. Defendants deny that there is any unlawful combination among them, or that any person is prevented from delivering stock to the Kansas City Stock Yards, or that the sale thereof is hindered or delayed, or expense or loss to the shipper entailed, or any obstruction or embargo placed upon the marketing of any live stock. Defendants deny that any of the rules of said association are in restraint of commerce between the states, or otherwise. Defendants deny that they have confederated together, in violation of the laws of the United States, to monopolize the business of buying and selling live stock at said yards, or to illegally fix a minimum price for buying and selling such live stock, or to restrain the free transmission of information respecting the state of the Kansas City market by telegraphic messages, or restrict the free employment of agents or solicitors in said business; that experience has shown that, to the success of such an organization, it is absolutely essential that there should be a uniform schedule of commissions, and that all members should observe the same; and that, by permitting evasions or violations of such schedule, a condition is created by which irresponsible persons might and would bring about a state of unhealthy cutting of prices,—a practice unfair to shippers and purchasers, and ruinous to responsible persons who carry on the occupation of commission merchants fairly. They have no desire to prevent any person from acting as a commission merchant at Kansas City, but they admit that it is not to the interest of the public or shippers to employ nonmembers, and that individually and collectively the provisions of their articles of association are invoked for the purpose of preventing the success of any competitor, either in his efforts to destroy said exchange, or to succeed in driving the competitors of such parties from the field.

The act of congress of July 2, 1890 (26 Stat. 209) under which this proceeding is brought, provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * *

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"Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

Section 4 gives to circuit courts of the United States jurisdiction to prevent and restrain violations of the act, and makes it the duty of the district attorney, under directions of the attorney general, to institute proceedings in equity to restrain such violations.

W. C. Perry, United States Attorney.

Karnes, Holmes & Krauthoff, McGrew, Watson & Watson, and Hutchings & Keplinger, for defendants.

FOSTER, District Judge (after stating the facts).

It will be observed that the answer of the defendants denies and puts in issue the allegations of the bill charging a combination or conspiracy or contract in restraint of trade or commerce, and denies any monopoly or attempt to monopolize or combination to monopolize any part of the trade or commerce among the several states, and denies that the business for which the exchange was organized, and in which its members are engaged, comes under the class of commerce or trade among the states.

The first question, whether there is any combination in restraint of trade or commerce, or a combination to monopolize any part of trade or commerce, on the part of the defendant association, is to be determined, not alone from what appears upon the face of its preamble, rules, and by-laws, but from the entire situation and the practical working and results of the defendants' methods of doing business, as disclosed by the testimony in the case. The defendant association is located at Kansas City, on the line between Kansas and Missouri, in the immediate vicinity of the Kansas City Stock Yards, and in close association therewith, being tenants of said stock-yards company. Said yards, with, perhaps, the exception of the yards at Chicago, are the largest in the country, and handle great numbers of live stock. These yards, the packing houses, and this exchange are all situated at the gateway through which flows the great stream of commerce of several states and territories, and among all the business tributary to this locality probably

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none is as important as the live-stock business and the various industries connected therewith. The defendant association is entirely voluntary in form, and does not directly require any person engaging in the live-stock commission business to become a member; but it will be observed that rule 16 prohibits any member from dealing with any person violating any of the rules or regulations of the exchange, or an expelled or suspended member, after notice of such suspension has been issued by the secretary or board of directors. In practice, as amply appears from the testimony of many witnesses, this rule shuts out all dealings and business intercourse between members and nonmembers of the association. It is shown beyond cavil that the entire membership of the association regards a commission merchant attempting to do business at the Kansas City Stock Yards without joining the exchange as one violating this rule, and treat him accordingly. And this construction is a natural one, for a compliance with the rules of the exchange requires a party to subscribe to its rules and by-laws, and to pay a membership fee (which is now \$2,500), to pay his assessments, and observe all other requirements, including the fees and commissions fixed for handling live stock; and it may well be said that any dealer or broker does business in violation of these rules who does business at all and fails to join the association. The testimony discloses several instances of parties attempting to enter the field, and do business there, without joining the exchange; and in every instance, unless protected by the courts, they have been compelled to abandon the undertaking. All parties now engaged in the business are members of the exchange, except Greer, Mills & Co., who are making a fight in the courts to maintain their business, and are temporarily protected by injunction. It appears from the testimony that any person or partnership attempting to carry on business independent of the association is invited to apply for membership, and if he fails to do so, or if rejected, and attempts to proceed, his name is written on a blackboard kept for public use in the exchange building, and all members are warned against dealing with him. This admonition is strictly obeyed, and such person is boycotted. The outcome is inevitable. The combined opposition of three hundred men

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against one can produce but one result. Almost every purchaser or vendor of live stock, including the great packing houses, does business through commission merchants, and nearly the entire volume of live stock received at the yards is consigned to and controlled by these merchants, members of the exchange. In vain does the outside dealer offer attractive bargains for the sale or purchase of stock; they will have no intercourse with him. This state of affairs is known and circulated among stock growers and shippers, and they dare not ship their stock to this boycotted broker or firm. These facts are established and amplified by a multitude of witnesses. The object and purpose of the exchange is written across its face, where all can read. It is to control and monopolize the entire business of buying and selling live stock at the Kansas City Stock Yards. It is clearly a combination to restrict, control, and monopolize that class of trade and commerce. The defendants declare that the rules, regulations, and prices for doing the business are all reasonable and fair and for the best interests of buyer and seller. Possibly that is so, although it is not apparent, looking at the interests of the stock grower or purchaser, why the number of solicitors of business should be limited to three for each firm, or why there should be a restriction on telegraphic information as to the state of the market, or why he should be compelled to pay a commission of 50 cents a head on cattle when he paid 25 cents before the exchange was organized, or why there should be discriminating charges on stock from different localities.

Counsel for defendants have, with commendable zeal and industry, submitted for our consideration the rules of a great number of exchanges and boards of trade throughout the cities of the United States, dealing in corporate stocks, grains, live stock, and various other things, and contend that they are essential, if not indispensable, to the commerce and business interests of the country, and that to grant the prayer of this bill would be the deathblow of those institutions. Courts cannot shut their eyes to the results of their judicial conclusions, but how far such results should control those conclusions depends on several conditions, not necessary to discuss here; nor would it be proper to consider here

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what effect this act of congress may have on these organizations, or any of them. I may be permitted to say, however, that the methods and aims of many of these exchanges and boards of trade are not altogether beneficial to the business and commerce of the country. That they are beneficial to the members, and perhaps to the locality, may be admitted. It must also be admitted that a properly conducted agency or medium through which the vendor and vendee may readily sell and buy everything that enters into commerce or trade is demanded by the business interests of the whole country; but this agency should not be permitted to tamper with or in any way impede or restrain the natural flow of the stream of industry or commerce. The crying complaint of to-day, and the great menace to the welfare of the people, is the tendency of wealth to monopolize and control, by trusts and combinations, the products and industries of the country; and it must be confessed by every thoughtful observer that many of the so-called stock and produce exchanges are among the most potent instruments for the accomplishment of these purposes by speculators and adventurers. Men who add nothing to the productive wealth of [537] the country grow rich or poor by gambling on the wealth produced by others. Men are daily selling, through these exchanges, millions of bushels of corn, wheat, and other produce, who neither have nor expect to have a bushel; and others are buying millions, who never expect to receive a bushel. Both sides are tampering with the normal prices fixed by the law of supply and demand, and attempting, by false and dishonest means and methods, to serve their ends. The courts have uniformly condemned this class of business as illegal, and, though it is under the ban of the law, it still flourishes. The remedy must be looked for in legislation, and not in the courts alone.

This act of congress is aimed against all restrictions of interstate commerce, and we need not discuss the reasonableness of such restrictions. It is evidently the purpose of the law to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts, or conspiracies, or monopolies whatsoever. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540; *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249;

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Leisy v. Hardin, 135 U. S. 107, 10 Sup. Ct. 681; *Walling v. Michigan*, 116 U. S. 454, 6 Sup. Ct. 454; *Robbins v. Tawing Dist.*, 120 U. S. 490, 7 Sup. Ct. 592.

But one material question remains in the case: Is the business in which the defendants are engaged commerce between the states? The circumstance that their place of business is located on both sides of the line between the states of Kansas and Missouri is, in my opinion, a fact of no material importance in the solution of this question; no more than would be the fact that the business of a farmer or manufacturer was so located, and that he passed from one state to the other for his convenience in the transaction of his usual business. The method of business of the defendants is as follows: The shipment of live stock from growers, dealers, and traders in Kansas, Colorado, Nebraska, Missouri, Texas, New Mexico, Arizona, Oklahoma, and other states and territories is solicited by the commission merchant in various ways, but largely by the personal solicitation of agents who travel about the country and interview the stock men. Frequently the commission man makes loans of money on the herds, secured by chattel mortgage. The consignment of the stock is made to the commission man or firm at the Kansas City Stock Yards, and there unloaded. Frequently the shipper draws on the consignee through his local bank with the bill of shipment attached; and, when the stock is sold, the loan on the cattle, or the draft on the consignee, as the case may be, is paid out of the proceeds, and the balance remitted to the shipper. While the broker is soliciting consignments of stock for sale, he is also on the alert for purchasers. He sells the stock without regard to its destination. Some is reshipped to other markets in other states, notably to Chicago and St. Louis. Much of it, especially hogs, is slaughtered at the large packing houses near by, in Kansas and Missouri. Is this business, so conducted, interstate commerce, or merely an incident or aid to such commerce?

Commerce among the states has been defined as follows:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and [538] the transportation and transit of per-

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sons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S. 691; *Gloves Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826.

In Re Greene, 52 Fed. 113, Judge Jackson says:

"In the application of this comprehensive definition, it is settled by the decisions of the supreme court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation; that it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another."

In *U. S. v. E. C. Knight Co.*, 156 U. S. 13, 15 Sup. Ct. 254, Mr. Chief Justice Fuller, speaking for the court, says:

"The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of such transit, may be regulated, but this is because they form part of interstate trade or commerce."

It has been repeatedly held by the supreme court that a person soliciting orders for goods or freights to be shipped from one state to another, and express agents transporting goods from state to state, are engaged in commerce between the states, and a local tax or license cannot be imposed for transacting such business. *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862. It has also been held that telegraphy between the states is interstate commerce. *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460. The question of what constitutes commerce between the states, and thus protected by the constitution, and that which is merely an incident or aid to such commerce, and exempt from federal control, has been much considered by the federal courts, and

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sometimes the line of distinction is difficult of discernment. Having a watchful regard for the police powers of the states, and the right of taxation, the federal courts have carefully discriminated in these cases, so that the general government should take nothing to itself not fairly delegated by the constitution. *Nathan v. Louisiana*, 8 How. 73; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468; *Kidd v. Pearson*, 128 U. S. 1-20, 9 Sup. Ct. 6; *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249; *Munn v. Illinois*, 94 U. S. 113; *In re Greene*, 52 Fed. 113; *Henderson v. Mayor, etc.*, 92 U. S. 259; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532.

Perhaps a fair test of the character of defendants' rules and by-laws would be presented by these questions: Could a state, by leg- [539] islation, impose on this traffic the restrictions and regulations demanded by these rules and by-laws? Could it limit the number of agents a merchant should have soliciting business in other states? Could it restrain telegraphic communication between points in different states? Could it make a discrimination in rates for handling stock shipped from different localities outside of the state? It is indisputable that all the live stock shipped to these defendants for sale from states other than Kansas and Missouri, after it has entered the current of commerce between the states, continues and remains the subject of such commerce until the transportation is terminated, and the property becomes a part of the general property of the state. It is also well settled that, while this property is the subject of interstate commerce, no state, municipality, or other power but congress can impose taxes, restrictions, or regulations upon it, except so far as is proper, in the exercise of police regulations, for the protection of the health, morals, and person of the citizen, and except for proper charges and regulations for the use of local instruments as aids or incidents to such commerce, such as docks, bridges, wharves, elevators, ferries, pilotage, etc., when congress has not acted in the matter.

In the case of *Bowman v. Railway Co.*, 125 U. S., at page

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497, 8 Sup. Ct. 704, Mr. Justice Matthews lays down this principle in the following language:

"It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property, or when it does those things which may otherwise incidentally affect commerce,—such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become a part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce."

Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062; *License Cases*, 5 How. 504; *Passenger Cases*, 7 How. 283; *Nathan v. Louisiana*, 8 How. 73; *Freight Tax Case*, 15 Wall. 232; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681 (*Original Package Case*); *Henderson v. Mayor*, 92 U. S. 259; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567; *Guy v. Baltimore*, 100 U. S. 434; *Railway Co. v. Becker*, 32 Fed. 849; *Plumley v. Massachusetts*, 155 [540] U. S. 461, 15 Sup. Ct. 154; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; *U. S. v. Addyston Pipe & Steel Co.*, 78 Fed. 712; *Packet Co. v. Keokuk*, 95 U. S. 80 (wharfage); *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865; *In re Minor*, 69 Fed. 233; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459; *Hooper v. California*, 156 U. S. 648, 15 Sup. Ct. 207; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367.

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Counsel for defendants contend that their business is only an aid or incident to commerce,—something in the nature of personal service; but it is not apparent that a combination for services may not be a restraint or monopoly of commerce, under the act of congress. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 312, 17 Sup. Ct. 540. But the business of defendants is more than personal services; it is not merely a local instrumentality in aid of commerce. Defendants are active promoters, and frequently interested parties, in this immense traffic. They reach out over many states and territories by their solicitors and advertisements, and gather in, for sale and slaughter, millions of cattle, sheep, and hogs, and their rules and regulations cover the entire business, and extend over the whole field of operation. Touching the question of what are aids or incidents to commerce, as well as police powers of the states, the following cases are in point: *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, Id. 430; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313; *Hall v. De Cuir*, 95 U. S. 485; *Cooley v. Board*, 12 How. 298; *Packet Co. v. Aiken*, 121 U. S. 444, 7 Sup. Ct. 907; *Sands v. Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. 113; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 582.

The defendants further contend that when this live stock reaches Kansas City, and is unloaded into the stock yards, it ceases to be the subject of interstate commerce. This proposition, however, covers but one point in the controversy, for several of the rules and by-laws of defendants have more than a local operation, and extend beyond state lines. Does this stock, once upon the stream of commerce, cease to be such when unloaded at Kansas City? Could the state of Kansas tax these cattle in the stock yards?

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The defendants cite the case of *Brown v. Houston*, 114 U. S. 623, 5 Sup. Ct. 1091, and *Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415. In the former case the coal which was subjected to taxation had reached its destination,—i. e. the state of Louisiana,—and was there offered for sale in great or small quantities to suit the purchaser. The court says:

[541] "It might continue in that condition for a year or two years, or for only a day. * * * We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load or car load of produce or merchandise brought into the city, that it would not be a regulation of and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive power of congress.

Bearing upon this question is the case of *Brown v. Maryland*, 12 Wheat. 419; also, *Leisy v. Hardin*, 135 U. S. 108, 10 Sup. Ct. 684. In this case, Mr. Chief Justice Fuller, speaking for the court, says:

"That the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer."

This live stock is shipped from different states for immediate sale, and, if the market at Kansas City is not satisfactory, it is to be shipped to another market. I cannot believe it ceases to be the subject of interstate commerce when unloaded into the stock yards. Sections 4386 and 4387 of the Revised Statutes humanely prohibit any railroad company whose road forms any part of a line over which animals are conveyed from one state to another from confining them in cars over 28 consecutive hours without unloading them for rest, water, and food for at least 5 consecutive hours. Under the act of congress of May 29, 1884, establishing a "Bureau of Animal Industry," and the act of March 3, 1891, for the inspection of live cattle, hogs, etc., the general government has established inspectors at the Kansas City Stock Yards assuming that such stock comes within the purview of said acts of congress. While realizing the importance of the issue

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involved in this case, and the responsibility of making application of the "Anti-Trust Act" to a new order of facts, I am impelled to the conclusion that, under the facts and the law applicable thereto, the prayer of this bill should be granted.

[998] ANDERSON ET AL. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit.)

[82 Fed., 998.]

Certified to Supreme Court for instructions upon certain questions, under the provisions of section 6 of the act of March 3, 1891.

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[Decision in the Supreme Court (171 U. S., 604). See p. 967. Case in the Circuit Court not reported.]

[36] NATIONAL HARROW CO. v. HENCH ET AL.*

(Circuit Court of Appeals, Third Circuit. October 29, 1897.)

[83 Fed., 36.]

RESTRAINT OF TRADE—COMBINATION OF PATENTEES.—Numerous manufacturers, under various United States patents, of float spring-tooth harrows, agreed to organize a corporation, to assign to it all the patents thus owned or thereafter to be acquired, and the good will of their business, and not to be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should license them to manufacture and sell, for their own account, subject to uniform terms and conditions, their respective makes, and should not itself manufacture or sell; that each licensee should pay one dollar for each such harrow manufactured and sold by him, and should receive paid-up stock in return for the patents and good will. Those who entered the agreement represented 70 per cent. of the total manufacture and sales of the United States. The corporation was formed and the assignments made. The licenses issued also bound the licensees not

* Suit originally brought in the Circuit Court for the Eastern District of Pennsylvania (76 Fed., 667). See p. 610. A similarly entitled case (84 Fed., 226), p. 746, is another suit, brought in the Circuit Court, Northern District of New York.

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to cut prices, not to sell other float spring-tooth harrows except under the licenses, and provided liquidated damages for every breach. *Held*, that the arrangement was an unlawful combination in restraint of trade.*

SAME—Though the fact that several patentees are exposed to litigation, justifies them in composing their differences, they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage.

[37] Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

W. P. Quinn, for appellant.

John G. Johnson, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

BUTLER, District Judge.

The essential facts are well stated by the circuit court, as follows:

"The National Harrow Company, a corporation of the state of New York,—to whose contract rights and general purposes the plaintiff, a subsequently created New Jersey corporation, has succeeded,—originated in a written agreement between a number of leading and distinct manufacturers, under various United States letters patent, of float spring-tooth harrows, whereby it was agreed that they would organize a corporation under the laws of New York and would assign to the corporation all United States letters patent which they respectively then owned or should thereafter acquire relating to float spring-tooth harrows and the good will of their business in such harrows, and that they would not thereafter be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should issue to the persons, firms and corporations respectively so assigning to it their said patents and the good will of their business exclusive licenses to manufacture and sell upon their own account, subject to uniform terms and conditions, the same style of harrows which they were making and selling just prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by its licenses; that each licensee should pay to the corporation one dollar on every float spring-tooth harrow manufactured and sold by such licensee, and that each person, firm, or corporation transferring to the corporation the good will of their float spring-tooth harrow business and their patents relating thereto, should receive in payment therefor the value thereof as agreed upon or as fixed by arbitration, in paid-up stock of the corporation.

"The agreement in the first instance was signed by six different manufacturers, but the contract contemplated and provided that others should come into the arrangement and become parties thereto. Accordingly other manufacturers of float spring-tooth harrows soon joined the combination, which then embraced twenty-two different persons, firms

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or corporations. Thus almost the entire output of float spring-tooth harrows made in the United States was brought under the regulation and control of this organization, its licensees manufacturing and selling at least 90 per cent. thereof.

"The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style of harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license in terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers than is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation one dollar upon each float [38] spring-tooth harrow, etc., manufactured and sold by them, agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license, and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions."

[76 Fed. 667.]

It is manifest, as well from the contract as from the proofs outside of it, that the purpose of the parties was to form a combination between the various manufacturers of these harrows, to prevent competition in business and enhance prices; and such is the effect of their agreement. The corporation, provided to hold the legal title of the several patents, is merely an instrument to effect this object. The prior owners are still the beneficial owners, with right to continue their business, subject only to the restraint in its management imposed by the contract. The provision for licenses is made necessary by the transfers of title, and is simply another part of the scheme for combination and control of the business of the several patentees. The result would be the same in legal contemplation if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition. That such a contract would be unlawful

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seems clear. While it is true that all contracts in restraint of trade are not prohibited, and it is sometimes difficult to determine whether a particular one is, there is no room for doubt that such a contract as this, which provides for general and unlimited restraint, is unlawful. To justify restraint, reason for it must be found in the nature of the property or the situation of the parties, as, for instance, in the sale of a business or professional good will, and other similar cases. Even then the restraint must be confined within such reasonable limits as the circumstances require. Here there is nothing to justify restraint, and that imposed is without any limitation whatever. The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. We do not see anything to distinguish this case, in principle, from *Nester v. Brewing Co.*, 161 Pa. St. 473 [29 Atl. 102]; *Carbon Co. v. McMillin*, 119 N. Y. 46 [23 N. E. [39] 530]; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Distilling & Cattle Feeding Co. v. People* [Ill. Sup.] 41 N. E. 188; *Strait v. Harrow Co.* [Sup.] 18 N. Y. Supp. 233. The last of these cases

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arose out of this contract under circumstances substantially like those of the case before us. A similar conclusion was reached by the court in *Harrow Co. v. Quick*, 67 Fed. 130, where this contract was involved. The doctrine of these cases is not new, and we feel no hesitation in applying it to the contract before us.

The judgment is therefore affirmed.

[226] NATIONAL HARROW CO. v. HENCH ET AL.

(Circuit Court, N. D. New York. January 3, 1898.)

[84 Fed., 226.]

MONOPOLIES—COMBINATION OF PATENT OWNERS—INFRINGEMENT SUIT.—

A combination among manufacturers of spring-tooth harrows, whereby a corporation, organized for the purpose, becomes the assignee of all patents owned by the various manufacturers, and executes licenses to them, so as to control the entire business and enhance prices, is void both as to the assignments and licenses, so that the corporation cannot maintain a suit against one of its assignors who violates the agreement, for infringement.*

This was a bill in equity by the National Harrow Company against Samuel N. Hench and others for alleged infringement of a patent.

Risley & Lowe, for complainant.

Cookinham, Sherman & Martin and *Strawbridge & Taylor*, for defendants.

Coxe, District Judge.

This is an equity suit for the infringement of letters patent, granted to the defendants and by them assigned to the complainant. The bill is in the usual form. The demand is for an injunction and an accounting. The plea alleges that the defendants assigned the letters patent in question to the complainant as part of an unlawful agreement, which was void as in restraint of trade and as against public policy, and

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that it was declared void by the [227] circuit court for the Eastern district of Pennsylvania, and by the circuit court of appeals for the Third circuit, in a suit between these parties. The plea has been set down for argument. In the previous litigation the Pennsylvania court decided that the agreement between these parties, and other manufacturers and venders of harrows, was an unlawful combination to enhance prices and prevent competition; that one of the means used to further this conspiracy was the creation of the complainant as a convenient instrument to take and hold the legal title to the patents owned by the members of the combination, the equitable title being still in the prior owners. In short, it was held that the organization of the complainant, the assignment to it of the patents, and the license from the complainant permitting the assignors to continue to make and sell harrows under the patents so assigned, were all steps in a general scheme to create a monopoly, and that the transaction was unlawful in its conception and purpose, as a whole and in all of its parts. These decisions will be found in *Harrow Co. v. Hench*, 76 Fed. 667, and 83 Fed. 36.

The bill is based upon the theory that, holding the legal title to the patent in controversy, the complainant can sue the owners of the equitable title, not as licensees but as infringers. The assignment of the patent was but one step in the combination. The license was another step. Both were necessary to carry out the illegal scheme. In the Pennsylvania circuit the complainant declared upon the license; now it declares upon the assignment. Both are invalid under the Pennsylvania judgment; the one as much as the other. To place any other interpretation upon the decision is to make it a mere brutum fulmen leading to results so illogical and inequitable as to border on the grotesque. The complainant was created solely to effectuate the purpose of the combination, the patent in suit being transferred as part of the unlawful scheme. Can it be possible that, based upon such a title, the complainant can levy tribute upon the defendants and thus accomplish by indirection the very object of the monopoly more effectually than if the court had not declared

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the whole transaction void? If as a result of the Pennsylvania litigation the complainant can seize the defendants' profits and also enjoin them from operating under their own patents their victory might better have been a defeat. In escaping Scylla they are hopelessly caught in the vortex of Charybdis. It certainly never was the intention of the parties tht the defendants should assign their patents to the complainant with no rights reserved. The assignment was in consideration of the license back and was part of the one agreement. The complainant has no title except such as it got through this agreement and this agreement has been declared void. The complainant contends that the assignment of the patent was a distinct and separate transaction, and that the bill can be supported upon the assignment alone, which was an innocent proceeding in itself. But as before stated the Pennsylvania decision treated all these steps as part of one illegal scheme. When the foundation upon which this edifice stood was shattered, the entire structure fell. The judicial bolt struck the keystone of the arch. Neither party can build upon the fragments that remain. As both were equally involved in the [228] prohibited scheme the court left them where their own acts placed them, declining affirmative relief to one as against the other. The plea is allowed.

[1018] HOPKINS ET AL. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 27, 1897.)

[84 Fed., 1018.]

Appeal from the Circuit Court of the United States for the District of Kansas. Questions certified to the supreme court, on December 8, 1897, under the provisions of section 6 of the act of March 3, 1891. Cause removed to the supreme court on writ of certiorari. See 82 Fed., 529 [(p. 725), and 171 U. S., 578 (p. 941)].

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Statement of the Case.

**[252] UNITED STATES *v.* COAL DEALERS' ASS'N
OF CALIFORNIA ET AL.**

(Circuit Court, N. D. California. January 28, 1898.)

[85 Fed., 252.]

MONOPOLIES—ANTI-TRUST LAW—RESTRAINING ORDER.—Under section 4 of the anti-trust law of July 2, 1890, a restraining order may be issued without notice, under the circumstances sanctioned by the established usages of equity practice in other cases.^a

PARTIES IN EQUITY—UNINCORPORATED ASSOCIATION.—In a suit in equity to restrain an alleged unlawful combination acting as an unincorporated association, it is sufficient that the association, together with a large number of its members, as individuals and officers of the association, are made parties defendant.

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—ANTI-TRUST LAW.—Under the anti-trust law of July 2, 1890, a contract or combination which imposes any restraints whatever upon interstate commerce is unlawful; and it is immaterial whether or not the restraint is a fair and reasonable one, or whether it has actually resulted in increasing the price of the commodity dealt in.

SAME—INTERSTATE COMMERCE.—Where coal is brought from other states and foreign countries to a certain city by importers and dealers, who, by a combination with a local coal dealers' association, regulate the retail prices arbitrarily, and provide against free competition, such combination is one in restraint of interstate commerce, in the meaning of the act of 1890.

In Equity.

Bill by the United States against the Coal Dealers' Association of California and the members of the association, and against Charles R. Allen, Central Coal Company, R. D. Chandler, George Fritch, J. C. Wilson & Co., Oregon Improvement Company, Oregon Coal & Navigation Company, W. G. Stafford, trading as W. G. Stafford & Co., R. Dunsmuir's Sons, John Rosenfeld, Louis Rosenfeld, and Henry Rosenfeld, partners, trading as John Rosenfeld Sons. The bill is brought to secure the dissolution of the Coal Dealers' Association of California, and to set aside an agreement between the said association and the other defendants, relating to the sale of coal in the city and county of San Francisco, alleged to be in restraint of trade and commerce, in violation of the act of July 2, 1890, and for an injunction restraining the defendants from further agreeing, combining, conspiring, and acting together in maintaining rules and regulations and rates and prices for coal brought from British Columbia, Washington, and Oregon to San Francisco, for domestic purposes as fuel.

H. S. Foote, United States District Attorney, and *Alfred L. Black*, Special Assistant United States Attorney.

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R. Y. Hayne and *William Craig*, for respondents Coal Dealers' Ass'n of California, Oregon Coal & Navigation Co., *W. G. Stafford*, and *R. D. Chandler*.

James T. Boyd and *W. H. Fifield*, for respondent *R. Dunsmuir's Sons*.

W. S. Goodfellow, for respondents Central Coal Co., *John Rosenfeld*, *Louis Rosenfeld*, and *Henry Rosenfeld*, partners trading as *John Rosenfeld Sons*.

John A. Wright and *George R. Lukens*, for respondents *J. S. Wilson & Co.*

T. C. Coogan, for respondents *Charles R. Allen* and *George Fritch*.

MORROW, Circuit Judge.

This is a bill in equity, brought by the United States attorney, upon the authority of the attorney general, in [253] the name of the United States, against the Coal Dealers' Association of California and the members of the association and certain firms and corporations doing business in San Francisco, for the purpose of dissolving the Coal Dealers' Association, as an unlawful combination, and to set aside an agreement between the said association and the other defendants, alleged to be in restraint of trade and commerce, in violation of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. It is alleged in the bill that the Coal Dealers' Association and the officers and members thereof are an unincorporated organization, composed of retail dealers in coal, residents in the city of San Francisco, and of miners and shippers of coal, who are residents of and are carrying on business in the city of San Francisco; that *R. Dunsmuir's Sons* are the agents and largely interested in and control and import coal from the Wellington colliers of British Columbia, from which comes a large part of the coal shipped from British Columbia; that *R. D. Chandler* is a wholesale coal dealer in the city of San Francisco, and imports and brings and deals in and sells coal brought from the state of Washington; that

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J. C. Wilson & Co. deal in coal brought from British Columbia; that the Oregon Coal & Navigation Company own coal mines in the state of Oregon, and import and bring coal to the state of California from said mines, and sell the same at wholesale; that W. G. Stafford & Co. import and bring coal from the state of Oregon; that the defendants and their associates comprise all the wholesale dealers who handle, bring, and import, and sell coal, used in San Francisco for domestic purposes as fuel; and that the said defendants, combined together, can absolutely control the price charged for coal for domestic purposes as fuel at said city of San Francisco, by reason of the fact that San Francisco is located at such a distance from all coal mines, other than those controlled by the defendants, that the rates of transportation are prohibitory, and make it an impossibility to import or bring coal as fuel for domestic purposes from any place or places or mines other than the mines owned, operated, and controlled by the defendants, or some of them; that all the coal mined in the state of California that is used as fuel in said San Francisco is owned and controlled by the defendants, or some of them. The bill further alleges that the city of San Francisco is a city of 290,000 population and upward; that the inhabitants generally use coal as fuel for domestic purposes, and that it is to them one of the prime and common necessities of life; that they use, as fuel for domestic purposes, about 800,000 tons of coal annually, of which amount more than 700,000 tons are mined in British Columbia and in the states of Oregon and Washington, and imported and brought to San Francisco; that the small percentage of about 50,000 tons is mined and produced in the state of California; and that this domestic product has no practical effect on the market price of coal in San Francisco. It is further alleged that in the year 1895 there were in the city of San Francisco divers and numerous persons engaged in the retail coal business, supplying coal as fuel for domestic purposes to the inhabitants of said city; that said coal came, in large part, through the agency of the dealers mentioned in the [254] bill, from British Columbia, the state of Washington, and the state of Oregon; that the retail

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dealers, in combination with certain wholesale dealers and importers of coal from British Columbia, and those bringing coal from the states of Washington and Oregon, and other dealers mentioned, with intent to form a contract, trust, and conspiracy in restraint of the trade and commerce between British Columbia, the state of Washington, the state of Oregon, and the state of California, and with intent to monopolize, and to attempt to monopolize, and combine and conspire to monopolize, the coal trade and commerce between British Columbia, Washington, Oregon, and California, to the extent of the coal used in the city of San Francisco as fuel for domestic purposes, did associate themselves together in the state of California, and on the 11th day of September, 1896, adopted a constitution and by-laws, the provisions of which are set out in full in the bill. For the present purpose, it will only be necessary to notice the following articles and sections:

CONSTITUTION.

"Article 1. Title and Object. (a) The title of this organization shall be the 'Coal Dealers' Association of California,' with principal place of business in San Francisco. (b) It shall have for its object the furnishing of information to its members as to sales of coal made by wholesale dealers to the retail dealers, and by retail dealers to consumers, and also the names of any dealers who have been guilty of violating any of the rates or rules made from time to time by this organization, and the furnishing of as complete a list as possible of delinquent consumers, and such other matters as may be decided upon.

"Art. 2. What Constitutes a Dealer. (a) Any person who engages in the sale of coal as regular business, buying to sell again, who shall own and operate a yard, keeping an office, and displaying a sign, shall be regarded as a retail dealer. (b) All miners and shippers shall be eligible to membership in this association, provided such miner and shipper shall not make a practice of selling coal, at retail, at less price than the retail dealers."

"Art. 4. Fees—Dues—Assessments. (a) The admittance fee for membership shall be two hundred (200) dollars, and must invariably accompany the application. (b) The amount of dues shall be fifty cents per month, payable quarterly in advance, and to date from the first day of the month following the month in which the member was admitted. (c) Assessments may be levied by a two-thirds vote of the members present at a regular meeting, but only in such cases when the interests of the association as a business society require it. (d) No assessment shall be levied unless it is expressed in the notice of meeting that 'a resolution to levy an assessment will be introduced.'"

"Art. 6. Failure to Pay Dues, Assessments, or Fines—Charges—

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Right of Appeal. (a) If any member shall neglect or refuse to pay the monthly dues and assessments as provided in the constitution and by-laws of this association within three days after the same have become due, he or they shall no longer be considered members of this association, or participant in its benefits, and shall surrender certificate of membership; but a written or printed notice must be sent, at the expiration of said time, to all those members who are delinquent, and may be reinstated within ten days thereafter by paying in full all dues."

BY-LAWS.

"Sec. 3. Officers and Their Duties. * * * (c) The secretary, prior to taking his office, shall be required to give a bond, for the faithful performance of his duties, in the sum of one thousand (1,000) dollars, with two sureties qualifying for the sum of five hundred (500) dollars each, and satisfactory to the board of directors. He shall collect all dues, issue all communications, notices, and other correspondence not provided for. He shall keep a register of all members of the association, together with a regular set of books for the proper conduct of business; receive all moneys due the association, and pay the same over to the treasurer; sign all orders on the treasurer for the payment of such [255] bills as may be approved by a majority of the finance and certificate purchasing committees. He shall keep a record, in a book provided for the purpose, of all transfers of certificates of membership; be the custodian of all properties of the association; receive all charges made of violation of the card rates and rules, and refer the same to the grievance committee for action, after using due diligence in securing such facts in the case as possible. He shall devote his entire time to the association, and under no circumstances is he allowed to be associated in any manner with any other business. He shall, on receipt of findings of the grievance committee, notify the wholesale dealers of such report, and request, in writing, that they impose the penalty for such violation. His compensation shall be fixed by the board of directors. * * *

"Sec. 4. Standing Committees. (a) A grievance committee consisting of three persons shall be appointed by the president, from the board of directors, on the first Monday of every month, to serve without compensation until the first Monday of the following month, or until their successors are appointed. They shall assemble whenever requested to do so by the secretary, and receive and investigate all charges of violation of card rules or rates preferred against any coal dealer or agent in the city and county of San Francisco, and report their findings to the secretary. They shall have the power to fix the time limit for the payment of any fines imposed by them. * * *

"Sec. 9. Advertising, Circulars, etc. (a) Dealers in advertising coal are not permitted to state prices without adding the names of coal to be had for the prices named; both names and prices to correspond exactly with those on rate card. (b) Any circulars, posters, dodgers, cards, or signs conflicting with the card rates or rules displayed, found on the streets or circulated in any manner whatsoever, shall subject the dealer or agent, who caused their distribution, to the penalties, as are provided in section 13 of these by-laws for selling coal in violation of card rates or rules.

"Sec. 10. Two or More Yards. A member having two or more yards cannot dispose of his certificate of membership in the sale of one yard, and retain his membership in the association.

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"Sec. 11. New Yards. Any member opening a new yard or yards after June 14th, 1895, in addition to the one that secured his admission in the association, shall be liable for an additional two hundred (200) dollars admittance fee and monthly dues for each yard so opened, in order for such yard or yards to participate in the benefits of the association.

"Sec. 12. Standard Rules and Weights. (a) No dealer shall give more or less than 100 pounds to 1 sack; 500 pounds to 5 sacks, or $\frac{1}{2}$ ton (short); 1,000 pounds to 10 sacks, or $\frac{1}{2}$ ton (short); 2,000 pounds to 20 sacks, or 1 ton (short); 2,240 pounds to 1 ton (long). (b) All long tons must be delivered in bulk. Names of coal must appear on bill exactly as they read on rate card. A load of coal delivered in bulk shall be per ton of 2,240 pounds. If handled after arrival at customer's place, an additional charge of fifty cents per ton must be made. A ton of coal delivered in twenty sacks, and put in bin, shall be 2,000 pounds. No premiums or presents are permitted to be offered as inducements for purchasers to buy coal. (c) Dealers shall be permitted to sell and deliver fifty pounds of coal at one-half card rates for one hundred pounds, but in no case shall they be allowed to sell coal in quantities ranging between fifty pounds and one hundred pounds.

"Sec. 13. Violations—Penalties. (a) If a dealer or agent, member or non-member, be found guilty of selling coal in violation of the card rates or rules, he shall be subject to a fine of not less than ten (10) dollars nor more than one hundred (100) dollars for first offense, not less than twenty-five (25) dollars nor more than two hundred (200) dollars for second offense; if a member of the association, be suspended and compelled to pay retail prices for third offense until restored to membership in good standing by the board of directors.

* * *

"Sec. 14. Agreement. The following agreement between the wholesale coal dealers of the city and county of San Francisco, Cal., and this association, is hereby embodied in this section, and made a part and parcel of the by-laws of this association:

"This agreement, made this first day of June, A. D. 1896, by and between the Coal Dealers' Association of California, an association, and the undersigned wholesale coal dealers, witnesseth: (1) That the purposes of this agreement are: [256] First, protection to consumers in receiving full amount and kind of coal purchased; second, protection to dealers in obtaining sufficient margin to carry on a safe business with justice to consumers. (2) That said wholesale dealers will not, nor will any or either of them, during the continuance of this agreement, sell coal at trade rates to any one not having an established yard; nor will any or either of them sell coal at less than card rates to consumers, except in such cases as may be provided for by agreement among said wholesale dealers themselves. (3) That said wholesale coal dealers hereby acknowledge the request of the Coal Dealers' Association of California, made to them on the sixth day of May, 1896, to charge one dollar (\$1.00) per ton additional over present trade rates for all coal sold by said wholesale dealers, or any or either of them, to the retail dealers in the city and county of San Francisco, who are not members of said association, and hereby agree to comply with said request, and will during the continuance of this agreement charge one dollar (\$1.00) per ton additional over trade rates for all coal sold to dealers carrying on business in said city and county who are not members of said association. (4) That upon receiving proof from the Coal Dealers' Association of the violation by any retail coal dealer of any of the rules of business printed on the rate card issued by said association, and being satisfied that the

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charge is established, said wholesale coal dealers agree, and each of them agrees, to, and will, charge the dealer so violating said rules or rule consumers' rates thereafter for coal, until said retail dealer, if a member of said association, shall have been reinstated to membership in the Coal Dealers' Association of California by the vote of the board of directors of said association, or, if not a member, until he shall have paid such reasonable penalty as may be imposed upon him by said association. (5) That the following rules and rates shall be enforced during the continuance of this agreement: That rates at which coal shall be sold to consumers shall be as shown on the rate card issued from time to time by the Coal Dealers' Association of California. A ton of coal delivered in twenty (20) sacks, and deposited in bin, will be 2,000 pounds; and no more nor less than twenty sacks shall constitute a ton so delivered. A ton of coal delivered in bulk shall be 2,240 pounds. For coal in bulk handled after arrival at place of delivery, an additional charge of fifty cents per ton shall be made, provided, however, if the handling after arrival at place of delivery consists only of shoveling or dumping coal in place of deposit, no additional charge shall be made. All long tons must be delivered in bulk. (6) That any member of the Coal Dealers' Association furnishing coal to another dealer who has been duly adjudged by the Coal Dealers' Association of California guilty of violation of the rules or any rule of said association printed on said rate card will himself suffer the penalty imposed by said association for violation of said rules. (7) That no member of the Coal Dealers' Association shall have the right to transfer his certificate of membership in said association until all indebtedness due to said wholesale coal dealers, or any of them, by the member of the said Coal Dealers' Association holding said certificate, shall have been paid, or until an adjustment between the debtor and creditors shall have been satisfactorily made by such debtor and creditors. (8) That in the event of the discontinuance of business by any member of said Coal Dealers' Association, and his failure to promptly settle his indebtedness due to said wholesale coal dealers, or any of them, then said Coal Dealers' Association shall have the right to declare such delinquent member's certificate forfeited to said wholesale coal dealers parties hereto, who are his creditors. That the said wholesale coal dealers for whose benefit said forfeiture takes place shall have the right to sell said membership certificate, and, upon the sale thereof, shall apply the proceeds of sale to the payment of the claims of the wholesale coal dealers parties hereto, holding claims against such delinquent member. That, after the application of the proceeds of such sale to the payment of the claims of said wholesalers, any surplus remaining shall be paid to the delinquent member. (9) And, in the event of a sale of his business, wholesale dealers shall decline to furnish coal to his successor, at the discretion of the association's directors, until the seller has paid all bills due by him to the wholesale dealers, who are parties hereto. (10) That this agreement does not apply to steam, hotel, restaurant, or church trade, nor to such trade as must be, necessarily, reserved by wholesale dealers as a means of protection to steam trade, and referred to in section 2 of this agreement. (11) That this agreement shall continue in full force and effect for the period of two years from date hereof, and shall apply only to said wholesale coal dealers and [237] retail coal dealers carrying on business within the city and county of San Francisco.

"In witness whereof, the parties hereunto set their hands, the day and year first above written, said Coal Dealers' Association signing by its president and secretary, thereunto authorized by resolution of said

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association duly passed, and said wholesale coal dealers signing their respective names.

“ [Signed]

COAL DEALERS' ASS'N OF CALIFORNIA,

“ By P. LYNCH, *President*.

“ By E. K. CARSON, *Secretary*.

“ CHARLES R. ALLEN.

“ CENTRAL COAL CO.,

“ By J. J. McNAMARA.

“ R. D. CHANDLER.

“ GEO. FRITCH,

“ Per J. HOMER FRITCH.

“ C. WILSON & Co.

“ OREGON IMPROVEMENT CO.,

“ JOHN L. HOWARD, *Manager*.

“ OREGON COAL & NAVIGATION CO.,

“ By C. M. GOODALL, *Vice-Pres.*

“ W. G. STAFFORD & Co.

“ R. DUNSMUIR & SONS,

“ By C. H. JOUETT.”

“ Sec. 15. Agencies or Offices. (a) Any member having agencies or offices other than those located at his yard, for the sale of coal, shall be compelled to have a certificate of membership for each of said agencies or offices. (b) In the event of the failure of any member to secure a certificate of membership for each agency or office, as referred to in paragraph (a) of this section, within five days after a written notice shall have been sent him by the secretary, he shall immediately cause the same to be closed, or subject himself to a fine of not less than ten (10) dollars nor more than one hundred (100) dollars for each agency or office that is known to be operated by him or for his benefit.

“ Sec. 16. Sales to Nonmember Dealers or Agents. (a) No member of this association shall be permitted to sell dealers or agents, who are nonmembers, coal for less than consumers' prices. * * *.”

The bill further alleges that the constitution and by-laws, since their adoption, have been, and now are, in full force and effect, save as amended by making the fee of membership \$500 instead of \$200, as provided in article 4 of the constitution, and by amending subdivision 3 of the agreement, set out in section 14 of the by-laws, by changing the words “one dollar (\$1)” to “two dollars (\$2),” where the same appears in said paragraph, and by changing the schedule of rates from time to time, so that the schedule of rates and rate card are as set forth in the bill. The terms of the agreement between the Coal Dealers' Association and the importers and wholesale dealers in coal, as set forth in the by-laws of the Coal Dealers' Association, are made the subject of still further allegations of combination, conspiracy, and confederation between the coal dealers in the establishment and maintenance of arbitrary rates for coal in San Francisco, and in depriving the residents of San Francisco of the benefits of

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free competition between owners, importers, and dealers in coal from British Columbia, Washington, and Oregon, whereby the trade, traffic, and commerce in this article has been monopolized and restrained, and dealers in coal who have been refused or were unable to become members of the Coal Dealers' Association have been compelled to desist from said business, and have been restrained from carrying on their trade, business, and dealing in coal in the city of [258] San Francisco brought from British Columbia, Washington, and Oregon. The prayer of the bill is that the Coal Dealers' Association be dissolved; and that the agreement between said association and the wholesale dealers be set aside; and that the defendants be enjoined and prohibited from further agreeing, combining, conspiring, and acting together to maintain rules and regulations and rates and prices for coal brought from British Columbia, Washington, and Oregon to San Francisco, for domestic purposes as fuel, to hinder trade and commerce between said states and foreign countries; and that all and each of them be enjoined and prohibited from entering and continuing in the combination, association, and conspiracy to deprive the people of the city of San Francisco of such facilities, rates, and prices for coal brought from British Columbia, Oregon, and Washington to the city of San Francisco, in the state of California, as will be afforded by free and unrestrained competition between the owners, operators, importers, and dealers of said coal used from said places in said city of San Francisco, for domestic purposes as fuel; and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to monopolize, or attempt to monopolize, said trade and commerce in coal between said states of Oregon, Washington, California, and said foreign country of British Columbia; and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to prevent each and any of their association from importing, dealing, and delivering coal from British Columbia, Washington, and Oregon to the city of San Francisco, state of California, and from dealing in the trade and commerce of the same between said states and said foreign country at

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such rates as shall be fixed by each of said defendants acting independently and separately on its own behalf.

Two affidavits supporting the material allegations of the bill were filed with the bill on December 16, 1897. One of these, made by a retail coal dealer in San Francisco, who is not a member of the Coal Dealers' Association, alleged, among other things, that, by reason of the fact that the constitution and by-laws of the Coal Dealers' Association and the agreement between the wholesale dealers and said association prohibited the sale to him of coal brought from Washington, Oregon, and British Columbia except at advanced prices, he had been greatly restrained and hindered in his dealings. Upon this showing, the court issued an order requiring the defendants to show cause, on the first Monday in January, 1898, why an injunction should not be issued, as prayed for in the bill, pending the litigation, and in the meantime the defendants were restrained and prohibited from charging or collecting from persons engaged in the retail coal trade in the city of San Francisco a price in excess of the same charged and collected from members of the Coal Dealers' Association for like purchases, in quantity and quality, of coal imported or brought from British Columbia, and from the states of Washington and Oregon. On December 18, 1897, the defendants appeared specially, and moved to set aside the preliminary restraining order, upon the grounds that the order was made without notice [259] to the defendants; that no irreparable injury had been shown to be probable by reason of the conduct of the defendants in the particulars in which they are sought to be restrained in the preliminary restraining order, nor in any particular; that the restraining order was not in accordance with the rules of practice of this court in such cases; that the act of July 2, 1890, commonly known as the "Anti-Trust Act," does not provide for any preliminary injunction or restraining order. The hearing of this motion was noticed for December 28, 1897, and afterwards continued to the first Monday in January, 1898, when it was heard at the same time with the order to show cause. The two matters will now be considered together.

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Section 4 of the act of July 2, 1890, provides as follows:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Under section 718 of the Revised Statutes, the court or judge is authorized, whenever notice is given of a motion for an injunction, to grant an order restraining the act sought to be enjoined until the decision upon the motion, where there appears to be danger of irreparable injury from delay. In so far as the language of the anti-trust act differs from the provisions of the Revised Statutes, it appears to have been the intention of congress to provide a more direct and summary proceeding in reaching the mischief which it was the purpose of the statute to remedy than had prevailed before under the general rules of equity practice. I am therefore clearly of the opinion that, under section 4 of the anti-trust act, a restraining order may be issued by the court or judge without notice, under the circumstances sanctioned by the established usages of equity practice. That practice requires, as a general rule, that notice of an application for a temporary restraining order, as well as for an injunction, shall be given to the person against whom it is desired; but in very pressing cases, where the mischief sought to be prevented is serious, imminent, and irremediable, the courts will grant a restraining order without notice, and they will do so where the mere act of giving notice to the defendant of the intention to make the application might of itself be productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be completed before the time for making the application has arrived. *Fost. Fed. Prac.* § 231. In the present case there is no allegation in the bill that the retail coal dealers or coal consumers of San Francisco, for whose benefit it may be assumed the action is

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brought, will suffer irreparable injury by delay; but the anti-trust act does not, in terms, require such a showing to justify the court in issuing a restraining order, and it may well be doubted whether such a showing would be [260] required even under the general rules of equity practice in a case involving a question of monopoly and restraint of trade. *Barthet v. City of New Orleans*, 24 Fed. 563; *U. S. v. Addyston Pipe & Steel Co.*, 78 Fed. 712, 716. It will not be necessary, however, to pass definitely upon this question in this case, since it is my purpose to consider and determine, without further delay, the questions presented upon the order to show cause why an injunction should not issue pending the litigation. But, before proceeding to that feature of the case, there is a further objection to be noticed.

It is contended that, as the Coal Dealers' Association is an unincorporated company, it cannot be brought into court by making it a party defendant by that name. In equity, the action must be against the individuals comprising such an association; but there is this exception: Where the parties are numerous, some of them may be brought in as representing the whole association. The title of this case is against "The Coal Dealers' Association of California, and All the Members of Said Association," and also against 17 individuals, who are designated as "Members and Officers of said Association." The return of the marshal shows that all these individuals have been served; that the president of the association has been served as an individual, and as president of the association; and he has appeared in the capacity of president in the affidavit filed by him, as has also the secretary of the association. This, I think, is sufficient, under the rule requiring sufficient parties, to represent all the adverse interests in the suit.

In response to the order to show cause, affidavits have been interposed by the defendants for the purpose of disproving the equity upon which the motion is founded; also a demurrer to the bill and parol exceptions to its legal sufficiency. The affidavits tend to show that the statement in the bill, that 800,000 tons of coal are used annually as fuel for domestic purposes by the inhabitants of San Francisco, is not true; that the number of tons so used does not probably exceed

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400,000 tons, and the amount imported and brought into San Francisco annually from British Columbia, Washington, and Oregon, and used for domestic purposes, is not in excess of 300,000 tons; that the defendants named in the bill as wholesale dealers and importers of coal are not all the wholesale dealers who handle, buy, and import, and sell coal used in San Francisco for domestic purposes; that the Black Diamond Coal Company is a corporation which handles, brings, and imports and sells coal used as fuel for domestic purposes, and that this corporation is not associated with any of the defendants, nor a party to the agreement with the Coal Dealers' Association of California; that the price and cost of mining and transporting coal from British Columbia, Washington, and Oregon have not been materially cheapened within the past few years, but have lately been increased, owing to the mine owners' inability to procure a sufficient number of miners since the exodus to the Alaska gold fields, and also by reason of the high rate for transporting coal from the above-mentioned places, due to the great demand for vessels in Alaska trade; that before the organization of the Coal Dealers' Association, and before the agreement mentioned [261] in the bill, the prices of all coals sold in the city and county of San Francisco, except British Columbia coal, used as fuel for domestic purposes, were largely in excess of the prices now charged; that in May, 1896, one month previous to the organization of the Coal Dealers' Association, British Columbia coals were \$9.50 and \$10 per ton, Washington coals were \$8 per ton, Oregon coals \$7.50 per ton; and a few months after said organization Washington coals were reduced to \$7.50 per ton, and fluctuated from that price to \$8, \$7, and \$7.50, which is the highest price; Oregon coals were reduced to \$7 per ton, then \$6.50 and \$6.25, and now is \$6.55; British Columbia coals have not changed in price, notwithstanding the duty on coal has been increased 40 cents to 67 cents per ton; that, prior to the organization of the Coal Dealers' Association, there were many persons engaged in the retail coal trade in the city of San Francisco who practiced dishonest methods, in giving short weights, substituting lower grades of coal for better grades, and in omitting to pay the amounts due from them

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to the wholesale dealers, to the injury of the wholesale dealers as well as to the retail trade. It is alleged that, in order to discourage these evils, the Coal Dealers' Association was formed and the agreements entered into between the association and the wholesale dealers, and it was in consideration of this partial security that the wholesale dealers agreed to sell to members of the association at a price less than that charged to nonmembers; that the agreement was entered into only for the purpose of dealing with and affecting coal in the state of California and city and county of San Francisco, and not for the purpose of monopolizing, conspiring, or attempting to monopolize or restrain the coal trade and commerce between British Columbia, Washington, Oregon, and California. It is further alleged that no sale of coal imported from any other state or territory is made to any member of the Coal Dealers' Association until after the same has been imported and delivered to the wholesale dealers, and bulk broken. The affidavits contain other allegations in relation to the coal business, which it will not be necessary to notice, in the view I take of the matters proper to be considered on this motion.

The title of the anti-trust act indicates the comprehensive scope and purpose of the statute. It is "An act to protect trade and commerce against unlawful restraints and monopolies." It is not limited to contracts and agreements that were unlawful at common law, nor to restraints and monopolies in violation of state statutes.

In *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290-327, 17 Sup. Ct. 540, the supreme court, referring to this title, said:

"The title refers to, and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in the text."

The first and second sections of the act are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be [263] deemed guilty of a

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misdeemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction, thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In the Freight Ass'n Case, *supra*, it was contended that this statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, did not mean what its language imports, but that it only meant to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act. The court discusses this question, and arrives at the conclusion that:

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress."

It is therefore no defense of a contract or combination, alleged to be in violation of the act, to say that, in view of all the circumstances and conditions, the contract or combination imposes only a fair and reasonable restraint upon trade and commerce. The question is, does it impose any restraint whatever? If it does, no matter how little or reasonable it may be, it is within the prohibition. This interpretation is in harmony with the other provisions of the statute, which make it unlawful to monopolize, or attempt to monopolize, any part of the trade or commerce among the several states or with foreign nations. The contract under consideration in the Freight Ass'n Case related to traffic rates for the transportation of persons and property by competing common carriers by railroad; but the doctrine of the case applies as well to articles of commerce—the subject of transportation—as it does to the business of transportation itself; and the clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the federal government shall be absolutely free, and no contract or

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combination will be tolerated that impedes or restricts their natural flow and volume.

Under the law as thus interpreted, two questions arise upon the facts in the present case. First. Do the constitution and by-laws of the Coal Dealers' Association and the agreement of the association with the importers and wholesale dealers operate in restraint of trade and commerce, or monopolize any part of the trade or commerce of San Francisco? And, if so, second, does this restraint or monopoly extend to any part of the trade and commerce carried on between this state and Oregon, Washington, or British Columbia?

There is no difficulty in arriving at a conclusion with respect to the first question. The constitution of the Coal Dealers' Association provides, among other things, that its object is to furnish information [263] to its members as to sales of coal made by wholesale dealers to the retail dealers, and by retail dealers to consumers, and also the names of any dealers who have been guilty of violating any of the rates or rules made from time to time by the organization. A retail dealer is defined as any person who engages in the sale of coal as regular business, buying to sell again, who shall own and operate a yard, keeping an office, and displaying a sign. All miners and shippers shall be eligible to membership in the association, provided such miner and shipper shall not make a practice of selling coal at retail at less prices than the retail dealers. The admittance fee for membership is \$500, but the association assumes the jurisdiction over dealers who are not members, and imposes fines upon those found guilty of selling coal in violation of card rates or rules. The fine is not to be less than \$10 nor more than \$100 for the first offense, and not less than \$25 nor more than \$200 for the second offense; and, if the nonmember shall neglect or refuse to pay any fine within the time limit fixed by the grievance committee, the secretary, at the expiration of the time, shall notify the wholesale coal dealers to charge the person so defaulting consumers' prices for coal, and the wholesale dealers agree to comply with the notice. The board of directors of the association may employ detectives to purchase coal at retail through any citizen. The purpose of this provision appears to be to discover those dealers who sell coal at other

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than card rates. A grievance committee is provided to assemble whenever requested to do so by the secretary, to receive and investigate all charges of violation of card rules or rates preferred against any coal dealer or agent in the city and county of San Francisco. It will be observed that the jurisdiction of this committee is not limited to the investigation of charges against members of the association, but includes all dealers. Dealers in advertising coal are not permitted to state prices without adding the name of the coal to be had for the prices named. Both names and prices to correspond exactly with those on the rate card. Any circulars, posters, dodgers, cards, or signs conflicting with the card rates or rules displayed, found on the streets, or circulated in any manner whatsoever, subjects the dealer or agent who caused their distribution to the penalties for selling coal in violation of card rates or rules. No dealer in coal is permitted to give more or less than certain weights in selling coal in specified quantities from sacks to tons. A charge is fixed for handling coal at customer's place, and no premiums or presents are allowed to be offered as inducements for purchasers to buy coal. The agreement with the wholesale dealers is made part of the by-laws of the association. The wholesale dealers agree not to sell at trade rates to any one not having an established yard, and not to sell coal at less than card rates to consumers, except in such cases as may be provided for by agreement among the wholesale dealers themselves. They agree to charge two dolloars per ton additional over current trade rates to retail dealers who are not members of the Coal Dealers' Association, and consumers' rates to dealers who violate any of the rules of the association. A schedule of rates is adopted for the different qualities and classes of coal sold in San Francisco.

[264] It is claimed on the part of the defendants that the Coal Dealers' Association is a beneficial organization; that it protects the coal consumers from the dishonest methods of some of the coal dealers in giving short weights and in substituting lower grades of coal for better grades; and that it also protects the wholesale dealers in enabling them to collect their bills from the retail dealers. All this may be true, but it is clear that the power of the association extends

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much further, and that it has another purpose. It establishes arbitrary rates for coal, from which the dealer is not permitted to deviate in any particular. It stifles all competition between retail dealers, restricts trade within prescribed limits, and establishes a monopoly of the most odious character in an article of daily consumption and prime necessity.

In *Nester v. Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102, the supreme court affirmed the judgment of the court of common pleas of Philadelphia, holding that a combination among a number of brewers of that city to control the price of beer within the city was illegal, being in restraint of trade. The agreement under which that combination was formed is of the same character as the one now under consideration, and this is what the trial court had to say about it:

"Where a price is fixed arbitrarily for which a manufactured article may be sold, it necessarily limits the production of that article to the amount that can be sold for that price. An increased price put upon an article restricts its sale, and the restricted sale necessarily reduces the production. It is no answer to say: 'We do not restrict your production. You may produce any amount you like. We only restrain your sale of it.' Is this not practically a limit to production? Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers."

This is precisely the attitude of the Coal Dealers' Association, and it is no answer to the charge of arbitrary power, which it can and does exercise under its organization, that it has not increased the price of coal in San Francisco, or wholly monopolized the source of supply. The terms of the organization and the agreement between the association and the wholesale dealers clearly constitute a restraint of trade, which is injurious to the public interests, against public policy, and therefore unlawful. *Arnot v. Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 580; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Distilling & Cattle Feeding Co. v. People* (Ill. Sup.) 41 N. E. 188; *Harrow Co. v. Hench*, 83 Fed. 86.

The next question is as to whether this restraint or monopoly extends to the trade or commerce among the several states or with foreign nations. In other words, do the facts

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in the case bring it within the jurisdiction of the national government, under the provisions of the anti-trust act? The retail prices for coal at San Francisco established by the Coal Dealers' Association, and agreed to by the wholesale dealers, are for different quantities of the following named coals, used as fuel for domestic purposes, namely: Wellington (Dunsmuir), Wellington (Southfield), Roslyn, Seattle, Bryant, and Coos Bay. The Wellington coal is imported from British Columbia; the Roslyn, Seattle, and Bryant, from Washington; and the Coos Bay, from Oregon. No card rate appears to have been fixed for coal produced in this state, probably because this quality of coal is not generally used for domestic purposes. We start, then, with the fact that the article which is the subject of the controversy is the product of other states and a foreign country, and is brought from such other states, and imported from the foreign country, by dealers and importers engaged in that business, and that these dealers and importers have entered into an agreement and combination with the Coal Dealers' Association whereby the business in dealing in this article is regulated and its retail prices in San Francisco fixed arbitrarily. The statement of these facts seems to be sufficient to determine the question; but it is contended very earnestly, on the part of the defendants, that the case presented by the bill is not within the law, and that the line dividing local from federal authority excludes it from the jurisdiction of this court.

What, then, is trade and commerce among the several states and with foreign nations? "Trade," in a business sense, has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "Commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile v. Kimball*, 102 U. S. 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S.

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196, 5 Sup. Ct. 826. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. *Gibbons v. Ogden*, 9 Wheat. 1, 194.

In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, the supreme court held that a state statute, prohibiting the sale of intoxicating liquors, except for certain purposes and under license from a county court, was unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the operation of the law was repugnant to the power of congress to regulate commerce among the several states. The court, in passing upon the question, said:

"The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

Again, to make this limitation on state authority over interstate commerce more clear, the court said:

"It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its [266] regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

If a law of a state, regulating the sale of intoxicating liquors, so as to prohibit their sale except for certain purposes and under license from a county court, is unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the law in that relation is in restraint of trade and commerce "among the several states," what shall be said of the constitution and by-laws of the Coal Dealers' Association, and the agreement of that association with the wholesale dealers respecting the sale of imported coal in San Francisco under the anti-trust act? If one is in restraint of commerce, is not the other? The claim that the coal is not sold until imported, delivered, and bulk broken is not sufficient. The

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principle of the original package does not apply to the sale of coal. It must be manifest that the arbitrary rules under which the combination of wholesale and retail dealers conduct their business affects the sale and disposition of coal immediately upon its arrival at San Francisco, and that, as an article of commerce, its freedom is restrained and hampered at the point of delivery into the state, and before it has become distributed by sale, and mingled in the common mass of property in the state. But the agreement of the importers and wholesale dealers, which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals by name; and it is this agreement, and what may be accomplished under it by the combination, that is to be considered, and not what the parties to it may be doing at any particular time.

In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, it was held by the supreme court that a law of Tennessee, requiring that all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods, wares, or merchandise therein by sample, should pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege, was, so far as it applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, a regulation of commerce among the several states. This case also arose before the passage of the anti-trust act, and was considered as coming within the established doctrine that congress had the exclusive power to regulate commerce under the constitution of the United States. Now, if this doctrine is applied to the facts of the present case, how can it be said that the rules and regulations imposed by the Coal Dealers' Association upon retail coal dealers of San Francisco, selling imported coal, is less an obstruction to commerce than the law of Tennessee, imposing a license tax upon drummers soliciting the sale of goods from another state? Manifestly, a court could not consistently condemn the latter, and excuse the first. Suppose the state of California were to provide, by statute, a fixed price for the sale, at retail in San Francisco, of Wellington, Roslyn, Seattle, Bryant, and

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Coos Bay coal, and require that all retail dealers in such coals should pay a license to the state of \$300 for the privilege of dealing in such coals at the established rates, and, to secure the [267] enforcement of such a law, should impose penalties on dealers who did not comply with the statute. Would there be any question as to the validity of such a statute? Would it not be so plainly in violation of the constitution and laws of the United States that no court would hesitate for a moment to declare it void? With what complacency, then, should the court view the terms of the agreement of the wholesale dealers with the Coal Dealers' Association, and the regulations, fees, dues, assessments, fines, and penalties provided by the latter association for the purpose of controlling all coal dealers engaged in dealing in these imported coals?

In the *Sugar Trust Case*, 156 U. S. 15 Sup. Ct. 249, it was held, substantially, that contracts relating to commodities, to come within the range of federal jurisdiction, must be subsequent to production, but it was also said that contracts to buy, sell, or exchange goods to be transported among the several states form part of interstate trade or commerce. A case entirely in point is that of *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. 432, brought under the anti-trust act, in 1891, against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville, and to change the same from time to time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined 2 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. Owners or operators of mines were not to sell or ship coal to any person, firm, or corporation in Nashville who were not members of the exchange, and dealers were not to buy coal from any one not a member of the exchange. It appeared that several mining companies in Kentucky engaged in raising coal and most of the coal dealers of Nashville had entered into this agreement. The court held the agreement was in restraint of trade and commerce, and that the defendants, by the organization of the Nashville Coal Exchange, and in their operations under it,

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had violated the law; and they were accordingly enjoined from further violations of the law. In *U. S. v. Hopkins*, 82 Fed. 529, the Kansas City Live-Stock Exchange, a voluntary unincorporated association, adopted articles of association and rules and by-laws whereby they agreed that they would faithfully observe and be bound by the same. Among the rules for the government of the exchange were fixed rates of commissions for the transaction of business, and limitations and prohibitions upon its members in dealing with nonmembers and with persons violating the rules and regulations of the exchange; these rules and regulations being enforced by means of fines, penalties, and assessments. Substantially all of the business transacted in the matter of receiving, buying, selling, and handling live stock at Kansas City stockyards was carried on by the members of the exchange as commission merchants. A large proportion of this live stock was shipped from the states of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa, and Arkansas, and the territories of Oklahoma, Arizona, and New Mexico, and was sold by the members of the exchange to the packing houses in Kansas City. It was held that the association [268] was an illegal combination to restrict, monopolize, and control trade and commerce.

It is not, however, necessary to multiply authorities dealing with this question. They are numerous, and they all clearly establish the doctrine that commerce among the several states and with foreign nations must be absolutely free and untrammelled, except as it may be regulated by congress; that no state law, with certain exceptions not necessary to be here stated, will be allowed to interfere with it, and no contract or agreement on the part of individuals, associations, or corporations will be permitted, directly or indirectly, to hinder or restrain its natural current or volume. In the light of the authorities and the principles they establish, it appears to me that the constitution and by-laws of the Coal Dealers' Association and the agreement of the wholesale dealers with that association come within the prohibitions of the act of July 2, 1890, and they are therefore unlawful. A temporary injunction will be prepared in accordance with this opinion.

Syllabus.

[271] UNITED STATES v. ADDYSTON PIPE & STEEL CO. ET AL.*

(Circuit Court of Appeals, Sixth Circuit. February 8, 1898.)

[85 Fed., 271.]

MONOPOLIES—CONTRACTS IN RESTRAINT OF TRADE—COMBINATIONS.—

Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or as giving rise to an action for damages to one prejudicially affected thereby, but were simply void, and not enforceable. The effect of the anti-trust law of 1890 is to render such [272] contracts, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also to create a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor both of private persons and the public against the execution of such contracts and the maintenance of such trade restraints.^b

SAME—RESTRAINTS LAWFUL AT COMMON LAW.—No contractual restraint of trade is enforceable at common law unless the covenant embodying it is merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employé), and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. But where the sole object of both parties in making the contract is merely to restrain competition, and enhance and maintain prices, the contract is void.

SAME—"ANTI-TRUST" LAW.—A number of companies manufacturing iron pipe in different states formed a combination whereby the territory in which they operated (comprising a large part of the United States) was divided into "reserved" cities and "pay" territory. The reserved cities were allotted to particular members of the combination, free of competition from the others, though provision was made for pretended bids by the latter at prices previously arranged. In the pay territory all offers to purchase pipe were

* Bill asking for a preliminary injunction was dismissed by the Circuit Court for the Eastern District of Tennessee (78 Fed., 712). See p. 631. Decree reversed and defendants perpetually enjoined by the Circuit Court of Appeals, Sixth Circuit (85 Fed., 271), which latter decree was modified and affirmed by the Supreme Court (175 U. S., 211). See p. 1009.

. ^b Syllabus and statement copyrighted, 1898, by West Publishing Co.

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submitted to a committee, which determined the price, and then awarded the contract to that member of the combination which agreed to pay the largest "bonus" to be divided among the others. *Held*, that this was an unlawful combination, both at common law and under the act of 1890, against trusts and monopolies. 78 Fed. 712, reversed.

SAME—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.—Contracts which operate as a restraint upon the soliciting of orders for, and the sale of, goods in one state, to be delivered from another, are contracts in restraint of interstate commerce, within the meaning of the act of July 2, 1890. *U. S. v. E. O. Knight Co.*, 15 Sup. Ct. 249, 156 U. S. 1, distinguished.

SAME—SUIT IN EQUITY—FORFEITURE OF GOODS.—In a suit in equity brought by the United States to enjoin the carrying out of a contract or combination in restraint of interstate commerce, under the act of 1890, there can be no seizure of goods in course of transportation pursuant to the unlawful contract. Such seizure can only be made under the sixth section of the act, which authorizes seizures and condemnation by like proceedings to those provided in cases of property imported into the United States contrary to law.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a proceeding in equity, begun by petition filed by the attorney general, on behalf of the United States, against six corporations engaged in the manufacture of cast-iron pipe, charging them with a combination and conspiracy in unlawful restraint of interstate commerce in such pipe, in violation of the so-called "Anti-Trust Law," passed by congress July 2, 1890. The defendants were the Addyston Pipe & Steel Company, of Cincinnati, Ohio; Dennis Long & Co., of Louisville, Ky.; the Howard-Harrison Iron Company, of Bessemer, Ala.; the Anniston Pipe & Foundry Company, of Anniston, Ala.; the South Pittsburg Pipe Works, of South Pittsburg, Tenn.; and the Chattanooga Foundry & Pipe Works, of Chattanooga, Tenn. The petition prayed that all pipe sold and transported from one state to another, under the combination and conspiracy described therein, be forfeited to the petitioner, and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants, and perpetually enjoining them from operating under the same, and from selling said cast-iron pipe in accordance therewith to be transported from one state into another. The defendants filed a joint and separate demurrer to the petition in so far as it prayed for the confiscation of [273] goods in transit, on the ground that such proceedings, under the anti-trust act, are not to be had in a court of equity, but in a court of law. In addition to the demurrer, the defendants filed a joint and separate answer, in which they admitted the existence of an association between them for the purpose of avoiding the great losses they would otherwise sustain, due to ruinous competition between defendants, but denied that their association was in restraint of trade, state or interstate, or that it was organized to create a monopoly, and denied it was a violation of the anti-trust act of congress. Testimony in the form of affidavits was submitted by petitioner and defendants, and, by stipulation it

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was agreed that the final hearing might be had thereon. Judge Clark, who presided in the circuit court, dismissed the petition on the merits. His opinion is reported in 78 Fed. 712.

From the minutes of the association, a copy of which was put in evidence by the petitioner, it appeared that prior to December 28, 1894, the Anniston Company, the Howard-Harrison Company, the Chattanooga Company, and the South Pittsburg Company had been associated as the Southern Associated Pipe Works. Upon that date the Addyston Company and Dennis Long & Co. were admitted to membership, and the following plan was then adopted:

"First. The bonuses on the first 90,000 tons of pipe secured in any territory, 18" and smaller, shall be divided equally among six shops. Second. The bonuses on the next 75,000 tons, 30" and smaller sizes, to be divided among five shops, South Pittsburg not participating. Third. The bonuses on the next 40,000 tons, 36" and smaller sizes, to be divided among four shops, Anniston and South Pittsburg not participating. Fourth. The bonuses on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg, and Anniston not participating. The above division is based on the following tonnage of capacity: South Pittsburg, 15,000 tons; Anniston, 30,000 tons; Chattanooga, 40,000 tons; Bessemer, 45,000 tons; Louisville, 45,000 tons; Cincinnati, 45,000 tons. When the 220,000 tons have been made and shipped, and the bonuses divided as hereinafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addyston Pipe & Steel Company, Dennis Long & Co., and the Howard-Harrison Company."

"It was thereupon resolved: First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896. Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote. Third. The Addyston Pipe & Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington, and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate. Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above-named cities. Fifth. The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above-named cities. Sixth. The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above-named cities. Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo. Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and co-operating with them. Thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

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"Note: It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

[274] "The following bonuses were adopted for the different states as named below: All railroad or culvert pipe or pipe for any drainage or sewerage purposes on 12" and larger sizes shipped into bonus territory shall pay a bonus of \$1.00 per ton. On all sizes below 12" and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of \$2.00 per ton.

List of Bonuses.

Alabama	\$3 00	Wyoming	\$4 00	Kansas	\$2 00
B'gham, Ala.....	2 00	Oregon	1 00	Ky	2 00
Anniston, Ala.....	2 00	Ohio	1 50	La	3 00
Mobile, Ala.....	1 00	N. D	2 00	Miss	4 00
Arizona Ter.....	3 00	S. D	2 00	Mo	2 00
California	1 00	Florida	1 00	Montana	3 00
Colorado	2 00	Georgia	2 00	Nebraska	3 00
Ind. Ter.....	3 00	Atlanta, Ga.....	2 00	N. Mex	3 00
North C.....	1 00	Ga. Coast Pts	1 00	S. C	1 00
Tenn., East of		Idaho	2 00	Minn	2 00
C'land	2 00	Nev	3 00	Utah	4 00
Tenn., Middle and		Oklahoma	3 00	Indiana	2 00
West	3 00	Wis	2 00	Iowa	2 00
Illinois, except		Texas, Interior....	3 00		
Madison and		Texas Coast.....	1 00		
East St. Louis,		Wash'ton Ter....	1 00		
as previously		Michigan	1 50		
provided	2 00	West Va.....	1 00		

"All other territory free.

"On motion of Mr. Llewellyn, the bonuses on all city work as specially reserved shall be \$2.00 per ton."

The states, for sales in which, bonuses had to be paid into the association were called "pay" territory, as distinguished from "free" territory, in which defendants were at liberty to make sales without restriction and without paying any bonus. The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the 1st and 16th of each month, he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same, and debit, credit, balance of each company." The system of bonuses, as a means of restricting competition and maintaining prices, was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and, except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following: "Whereas, the system now in operation in this association of having a fixed bonus on the several states has not, in its operation, resulted in the advancement in the prices of pipe, as was anticipated, except in reserved cities, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: Therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to

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the said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city, to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops." In pursuance of the new plan, it was further agreed "that all parties to this association, having quotations out, shall notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st bonuses shall be fixed by the committee." At the meeting of December 19, 1895, it was moved and carried that, upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, prices and bonuses should be fixed at a regular or called meeting of the principals. At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into "pay" territory rather than the totals shipped into "pay" and "free" territory.

[275] To illustrate the mode of doing business, the following excerpt from the minutes of the meetings of December 20, 1895, February 14, 1896, and March 13, 1896, is given: "It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for \$23.40, delivered. Carried. It was moved that Anniston participate in the bonus, and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of \$8." "Moved that 'bonus' on Anniston's Atlanta Waterworks contract be fixed at \$7.10, provided freight is \$1.60 a ton. Carried." An illustration of the manner in which "reserved" cities were dealt with may be seen in the case of a public letting at St. Louis. On February 4, 1896, the water department of that city let bids for 2,800 tons of pipe. St. Louis was "reserved" to the Howard-Harrison Company, of Bessemer, Ala. The price was fixed by the association at \$24 a ton, and the bonus at \$6.50. Before the letting, the vice president of this company wrote to the other members of the association, under date of January 24, 1896, as follows: "I write to say that, in view of the fact that I do not as yet know what the drayage will be on this pipe, I prefer that, if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than \$27 for the pipe, and 2½ cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders." The contract was let to the Howard-Harrison Company, of Bessemer, at \$24, who allowed the Shickle, Harrison & Howard Company, a pipe company of St. Louis, not in the association, but having the same president as the Howard-Harrison Company, of Bessemer, to fill part of the order. The only other bidders were the Addyston Pipe & Steel Company and Dennis Long & Co., the former bidding \$24.37, and the latter \$24.57. The evidence shows that the Chattanooga Foundry could have furnished this pipe, delivered in St. Louis, at from \$17 to \$18, and could have made a profit on it at that price. The record is full of instances of a similar kind, in which, after the successful bidder had been fixed by the "auction pool," or had been fixed by the arrangement as to "reserve" cities, the other defendants put in bids at the public letting as high as the selected bidder requested, in order to give the appearance of active competition between defendants.

In January, 1896, after the auction pool had been in operation for more than six months, the Chattanooga Company wrote a letter to its representative in the central committee to outline its policy for the new year, and the statements of the letter cast much light on the

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prices bid and the character of bonuses fixed. The letter is dated January 2, 1896, and is as follows: "Dear Sir: Referring to our policy for 1896, in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement, as to the amount of business done last year in pay territory, and from estimates that we have made for business that will come into that territory for 1896, we have been able to determine to what point we could bid on work and take contracts, and, if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., Cincinnati, and other shops, who have been bidding bonuses of \$6 or \$8 per ton, can come out and make any money if they continue to bid such bonus. In the case of the Howard-Harrison Iron Co. people, on Jacksonville, Fla., the truth of the business is they are losing money at the prices they bid for this work. If they take the contract at \$19 delivered, it will only net \$16 at the shop after they have paid back the bonus of \$4.75. If they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they, of course, calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid, and we only hope they will keep it up, as it is only money in our pockets. As long as there is no money to us, let them make the pipe, as we shall continue to do so. For the present you will adopt the following basis: On 16" and under standard weights, \$14.25 at shop; on 18" and 36" standard weights, \$13; on 16" and under light weights, \$14.50 to \$14.75 at shop. That is, you will bid all over \$13, \$14.25 and \$14.50 on work. If we get work at these prices, it will be satisfactory. If the others run bonus above this point, let them take it, as it will be more [276] money to us to take the bonus. We note Mr. Thornton's report of average premiums from June 1st to December, that the average was \$3.63. The average bonuses that are prevailing to-day are \$7 to \$8. We cannot expect this to continue; and we think your estimate of \$6 ton average bonus is high, as we do not believe the premiums for '06 will average that price, unless there is a decided change for the better in business. We find there was sold and shipped into 'pay territory' from January 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons; and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year; more than that, probably overrun 240,000 tons, from the fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market last year or last season, from the fact that they were out of funds. On the basis as given you above, if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would pay us the average 'bonus,' which might be from \$3.50 to \$5 on our 40,000. If we cannot secure business in 'pay territory' at paying prices, we think we will be able to dispose of our output in 'free territory,' and, of course, make some profit on that. At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines, and one or two other points, they are losing from \$2.50 to \$3 per ton; that is, provided 'bonuses' would not be returned to them. Therefore, when business goes at a loss, we are willing that other shops make it."

Another letter written by the same company, pending a trouble over a letting at Atlanta, is significant. The Anniston Company, to whom Atlanta had been "reserved," made its bid so high (\$24) that a Philadelphia pipe firm, R. D. Wood & Co., had been able to under-

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bid the Anniston Company in spite of difference in freights. All the bids had been rejected as too high, and, upon a second letting, Anniston's bid was \$1.25 a ton less, and the job was awarded to it. The charge was then made by Atlanta persons that there was a "trust" or "combine." This was vigorously denied. The letter of the Chattanooga Company evoked by this difficulty was dated February 25, 1896, and read as follows: "Gentlemen: We are in receipt of a carbon copy of your favor of the 24th instant, to F. B. Nichols, V. P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape and that R. D. Wood & Company should make a lower bid by one dollar a ton than the Southern shops. You know we have always been opposed to special customers and 'reserved cities.' We do not think that it is the right principle, and we believe, if the present association continues, that all special customers and reserved cities should be wiped out. There is no good reason why we should be allowed to handle New Orleans; you, Atlanta; Howard-Harrison Iron Co., St. Louis; or South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry, and we believe that the result would be more benefit to all concerned if all business was made competitive. It is hardly right, and we believe, if you will think over the matter carefully, you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. We cannot explain our position to the Atlanta people, and we consider it is detrimental to our business, and think no combination should have the power to force us into such a position. The same argument will apply with you as to New Orleans, St. Louis, and other places. We think this matter should be considered seriously, and some action taken that will result in re-establishing ourselves (I mean the four Southern shops) in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man, has no doubt told them all about our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected, and have had all their business for the past two years, is proof to them that such a 'combination' exists; and they state that, if they find out positively that we are working together, they will never receive a bid from any one of us again. We cannot afford to leave these people under that impression, and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities 'reserved' is all based upon mere sentiment, and no good reason exists why it should be so. We believe that, as a general thing, we have had our prices entirely too high, and especially do we believe this has been the [277] case as to prices in reserved cities. The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been, and always will be, when high prices are named, to create a bad feeling and an agitation against the combination. There is no reason why Atlanta, New Orleans, St. Louis, or Omaha should be made to pay higher prices for their pipe than other places near them, who do not use anything like the amount of pipe, and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta, as we would as soon sell our pipe anywhere else, only, as stated above, it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of."

It appears quite clearly from the prices at which the Chattanooga and the South Pittsburg Companies offered pipe in free territory that any price which would net them from \$13 to \$15 a ton at their foundries would give them a profit. Pipe was freely offered by the de-

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defendants in free territory more than 500 miles from their foundries at less prices than their representative board fixed prices for jobs let in cities in pay territory nearer to defendants' foundries by 800 miles or more. The defendants adduced many affidavits of a formal type, chiefly from persons who had been buying pipe from defendants and other companies, who testified in a general way that the prices at which the pipe had been offered by defendants all over the country had been reasonable; but in not one of the affidavits was any attempt made to give figures as to cost of production and freight, and in not a single case were the specific instances shown by the evidence for the petitioner disputed. The evidence as to the capacity of the defendants' mills is by no means satisfactory. The division of bonuses was based on an aggregate yearly output of 220,000 tons, but there are averments in the answer that indicate that this was not a statement of the actual limit of capacity, but was only taken as a standard of restricted output upon which to calculate an equitable division of bonuses. Nowhere in the large mass of affidavits is there any statement of the per diem capacity of defendants' mills. Taking their aggregate capacity, however, as 220,000 tons, that of the other mills in the pay territory was 170,500 tons, and that of the mills in free territory was 848,000 tons, according to the affidavit of the chief officer of one of defendants. Of the nonassociation mills in the pay territory, one was at Pueblo, Colo., another was in the state penitentiary at Waco, Tex., and a third in Oregon. Their aggregate annual capacity was 45,500 tons. Another nonassociation mill was the Shackle, Howard & Harrison mill of St. Louis, Mo., with a capacity of 12,000 tons. John W. Harrison, who was president of this company, was also president of the Howard-Harrison mill of Bessemer, Ala., which was a member of the association; and it appears that an order taken by the Bessemer mill at St. Louis was partly filled by the St. Louis mill. The other mills in the pay territory were one at Columbus, Ohio, with an annual capacity of 30,000 tons; one at Cleveland, Ohio, of 60,000 tons; one at Newcomerstown, in northeastern Ohio, of 8,000 tons; and one at Detroit, Mich., of 15,000 tons; and their aggregate annual capacity was 113,000 tons. In the free territory there was one mill in eastern Virginia, with an annual capacity of 16,000 tons; four mills in eastern Pennsylvania, with a capacity of 87,000 tons; three mills in New Jersey, with a capacity of 210,000 tons; and two mills in New York, one at Utica, and another at Buffalo, with an aggregate capacity of 35,000 tons. The evidence was scanty as to rates of freight upon iron pipes, but enough appeared to show that the advantage in freight rates which the defendants had over the large pipe foundries in New York, eastern Pennsylvania, and New Jersey in bidding on contracts to deliver pipe in nearly all of the pay territory varied from \$2 to \$6 a ton, according to the location. The defendants filed the affidavits of their managing officers, in which they stated generally that the object of their association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between defendants, which would have carried prices far below a reasonable point; that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price, in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible, and more than his due proportion; that the prices fixed by the association were always reasonable, and were always fixed, as they must have been, with reference to the very active competition of other pipe manufacturers for every job; that the reason why they sold pipe at so much cheaper rates in the free territory than in the [278] pay territory was because they were willing to sell at a loss to keep their mills going rather than to stop them; that the prices

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at a city like St. Louis in which the specifications were detailed and precise, were higher because pipe had to be made especially for the job, and they could not use stock on hand. The defendants devoted a good deal of evidence to showing that the stenographer who furnished copies of the minutes of the association and of the correspondence between the members had a pecuniary motive in thus betraying the confidence of his employers; but no evidence was offered by them to contradict any statements made by him, or to impeach the accuracy of the copies he has produced. On one point alone was he contradicted, and that was in his statement that the bonuses represented the increase over and above a reasonable price made possible by the combination of the defendants.

J. H. Bible and *Edward B. Whitney*, for the United States.

Frank Spurlock, for appellees.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first section of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," passed July 2, 1890 (26 Stat. 209), declares illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The second section makes it a misdemeanor for any person to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. The fourth section of the act gives the circuit courts of the United States jurisdiction to hear and determine proceedings in equity brought by the district attorneys of the United States under the direction of the attorney general to restrain violations of the act.

Two questions are presented in this case for our decision: First. Was the association of the defendants a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood in the act? Second. Was the trade thus restrained trade between the States?

The contention on behalf of defendants is that the association would have been valid at common law, and that the

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federal anti-trust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the supreme court of the United States in *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment necessarily under public control, and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or quasi public character. Whether or not there is substance in such a distinction,—a question we do not decide,—it is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of [279] trade, it is within the inhibition of the statute if the trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] App. Cas. 25; *Hornby v. Close*, L. R. 2 Q. B. 153; Lord Campbell, C. J., in *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; Hannen, J., in *Farrer v. Close*, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the re-

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straints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.

Chief Justice Parker, in 1711, in the leading case of *Mitohel v. Reynolds*, 1 P. Wms. 181, 190, stated these objections as follows:

"First. The mischief which may arise from them (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible."

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[280] The reasons were stated somewhat more at length in *Alger v. Thacher*, 19 Pick. 51, 54, in which the supreme judicial court of Massachusetts said:

"The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in *Alger v. Thacher* have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states.

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and

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trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. [281] This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employer.

In a case of this last kind, *Mallan v. May*, 11 Mees. & W. 652, Baron Parke said:

"Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a good will, and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry. * * * And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract

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that he will not carry on the same trade or profession within certain limits. * * * In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought, or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business. Under the first class come the cases of *Mitchel v. Reynolds*, 1 P. Wms. 181; *Fowle v. Park*, 181 U. S. 88, 9 Sup. Ct. 658; *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] App. Cas. 534; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Whittaker v. Howe*, 3 Beav. 388; *Match Co. v. Roebber*, 106 N. Y. 473, 18 N. E. 419; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469; *Beal v. Chase*, [282] 31 Mich. 490; *Hubbard v. Miller*, 27 Mich. 15; *National Ben. Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806; *Whitney v. Slayton*, 40 Me. 224; *Pierce v. Fuller*, 8 Mass. 222; *Richards v. Seating Co.*, 87 Wis. 503, 58 N. W. 787. In the second class are *Tallis v.*

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Tallis, 1 El. & Bl. 391, and *Lange v. Werk*, 2 Ohio St. 520. In the third class are *Machinery Co. v. Dolph*, 138 U. S. 617, 11 Sup. Ct. 412, Id., 28 Fed. 553, and *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981. In the fourth class are *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, and *Hitchcock v. Anthony*, Id. 779, both decisions of this court; *Navigation Co. v. Winsor*, 20 Wall. 64; *Dunlop v. Gregory*, 10 N. Y. 241; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335. While in the fifth class are the cases of *Homer v. Ashford*, 3 Bing. 322; *Horner v. Graves*, 7 Bing. 735; *Hitchcock v. Coker*, 6 Adol. & E. 454; *Ward v. Byrne*, 5 Mees. & W. 547; *Dubowski v. Goldstein*, [1896] 1 Q. B. 478; *Peels v. Saalfeld*, [1892] 2 Ch. 149; *Taylor v. Blanchard*, 13 Allen, 370; *Keeler v. Taylor*, 53 Pa. St. 467; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horner v. Graves*, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] App. Cas. 535, 567), used the following language:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the

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covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse [283] the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to

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the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. In *Mitchel v. Reynolds*, 1 P. Wms. 181, the leading early case on the subject, in which the main object of the contract was the sale of a bake house, and there was a covenant to protect the purchaser against competition by the seller in the bakery business, Chief Justice Parker laid down the rule that it must appear before such a covenant could be enforced that the restraint was not general, but particular or partial, as to places or persons, and was upon a good and adequate consideration, so as to make it a proper and useful contract. Subsequently, it was decided in *Hitchcock v. Coker*, 6 Adol. & E. 454, that the adequacy of the consideration was not to be inquired into by the court if it was a legal one, and that the operation of the covenant need not be limited in time. More recently the limitation that the restraint could not be general or unlimited as to space has been modified in some case by holding that, if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. *Whittaker v. Howe*, 3 Beav. 383; *Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] App. Cas. 535. See, also, *Fowle v. Park*, 181 U. S. 88, 9 Sup. Ct. 658; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419. But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have [284] set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint

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of the parties, how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it. The cases assuming such a power in the courts are *Wickens v. Evans*, 3 Younge & J. 318; *Collins v. Locke*, 4 App. Cas. 674; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (U. C.) 540; *Kellogg v. Larkin*, 3 Pin. 123; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363.

In *Wickens v. Evans*, three trunk manufacturers of England, who had competed with each other throughout the realm to their loss, agreed to divide England into three districts, each party to have one district exclusively for his trade, and, if any stranger should invade the district of either as a competitor, they agreed "to meet to devise means to promote their own views." The restraint was held partial and reasonable, because it left the trade open to any third party in either district. In answer to the suggestion that such an agreement to divide up the beer business of London among the London brewers would lead to the abuses of monopoly, it was replied that outside competition would soon cure such abuses,—an answer that would validate the most complete local monopoly of the present day. It may be, as suggested by the court, that local monopolies cannot endure long, because their very existence tempts outside capital into competition; but the public policy embodied in the common law requires the discouragement of monopolies, however temporary their existence may be. The public interest may suffer severely while new competition is slowly developing. The case can hardly be reconciled with later cases, hereafter to be referred to, in England and America. It is true that there was in this case no direct evidence of a desire by the parties to regulate prices, and it has been sometimes explained on the theory that the agreement was solely to reduce the expenses incident to a business covering the realm by restricting its territorial extent; but it is difficult to escape the conclusion that the restraint upon each two of the three parties was imposed to secure to the other a monopoly and

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power to control prices in the territory assigned to him, because the final clause in the contract implies that, when it was executed, there were no other competitors except the parties in the territory divided.

Collins v. Locke was a case in the privy council. The action was brought to enforce certain articles of agreement by and between four of the leading master stevedore contracting firms in Melbourne, Australia, who did practically all the business of that port. The court (composed of Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier) describes the scope and purposes of the agreement and the view of the court as follows:

"The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and so to prevent competition, at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means,—that is, by [285] provisions reasonably necessary for the purpose,—though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade."

No attempt is made to justify the view thus comprehensively stated, or to support it by authority, or to reconcile it with the general doctrine of the common law that contracts restraining competition, raising prices, and tending to a monopoly, as this is conceded by the court to have been, are void. The court ignores the public interest that prices shall be regulated by competition, and assumes the power in the court to uphold and enforce a contract securing a monopoly if it affect only one port, so as to be but a partial restraint of trade. The case is directly at variance with the decision of the supreme court of Illinois in *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, hereafter discussed, and cannot be reconciled in principle with many of the other cases cited.

The Canadian case of *Ontario Salt Co. v. Merchants' Salt Co.* is another one upon which counsel for the defendants rely. That was the decision of a vice chancellor. Six salt companies, in order to maintain prices, combined, and put their business under the control of a committee, and agreed not to sell except through the committee. It was held that because it appeared that there were other salt companies in the province, and because the combiners denied

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that they intended to raise prices, but only to maintain them, the contract of union was not in unlawful restraint of trade. The conclusion and argument of the court in *Salt Co. v. Guthrie*, 35 Ohio St. 666, hereafter stated, would seem to be a sufficient answer to this case.

Kellogg v. Larkin, 3 Pin. 123, was an early case in Wisconsin, in which the action was on the covenant of a warehouseman in a lease of his warehouse, by which he agreed to devote his services to the lessee at certain compensation, and not to purchase or store wheat in the Milwaukee market. The covenant was held valid. Had nothing else appeared in the case, the conclusion would have been clearly right, because such a covenant might well have been reasonably necessary to the protection of the lessee in his enjoyment of the warehouse and the good will of the lessor. But it further appeared that this lease, with the covenant, was only one of many such executed by the warehousemen of Milwaukee to the united grain dealers of that city, to enable the latter to obtain absolute control of the wheat market in Milwaukee. The court held the latter combination valid also. The decision cannot be upheld, in view of the more modern authorities hereafter referred to.

The case of *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, would seem to be an authority against our view. In that case a stockholder sought to restrain the payment of an annual payment about to be made by the Old Dominion Steamship Company under a contract by which it bought off the Lorillard Steamship Company from continuing in competition with it in carrying passengers and freight between New York and Norfolk. The contract was held valid, although it had no purpose except the restraining of competition, and, so far as appears, the obtaining of the complete control of the business. The case is rested on *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, which was a case of the purchase of property and good will. It proceeds on the [286] general proposition "that competition is not invariably a public benefaction; for it may be carried on to such a degree as to become a general evil," and thus leaves it to the discretion of the court to say how much competition is desirable, and how much is mischievous, and accordingly

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to determine whether a contract is bad or not. The case is directly opposed to *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, hereafter cited. It should be said that nothing appears in the report of the case to show directly that the purpose of the contract was to reserve the entire business to the Dominion Company, or to secure to it the power of regulating prices, but this natural inference from the terms of the contract is not negatived.

The case of *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] App. Cas. 25, has been cited to sustain the position of the defendants. It does not do so. It was a suit for damages, brought by a company engaged in the tea-carrying trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade, and to obtain control of the trade themselves. It appeared that the defendants agreed to conform to a plan of association, by which they should constantly underbid the plaintiff, and take away his trade by offering exceptional and very favorable terms to customers dealing exclusively with the members of the association, and that they did this to control the business the next season after he had been thus driven out of competition. It was held by the house of lords that this was not an unlawful and indictable conspiracy, giving rise to a cause of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46), and Lord Hannen, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade; but all the law lords were of opinion that contracts void as in restraint of trade were not unlawful in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the *Mogul Steamship Co.* Case has in this discussion makes for, rather than against, our conclusion.

Two other cases deserve mention here. They are *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629, and *Gloucester*

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Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005. In these cases it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient, are not articles of prime or public necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case the article involved was a fastening of a certain shade roller, and in the other was glue made from fish skins. We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its in- [287] dividual members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth, and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court, in *Telegraph Co. v. Crane*, 160 Mass. 50, 35 N. E. 98, held that fire-alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe.

There are other cases upon which counsel of defendants rely, which, in our judgment, have no bearing on the issue, or, if they have, are clearly within the rules we have already stated. One is a case in which a railroad company made a contract with a sleeping-car company by which the latter agreed to do the sleeping-car business of the railway company on a number of conditions, one of which was that no other company should be allowed to engage in the sleeping-car business on the same line. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 11 Sup. Ct. 490. The main purpose of such a contract is to furnish sleeping-car facilities to the public. The railroad company may discharge this duty itself to the public, and allow no one else to do it, or it may hire some one to do it, and, to secure the necessary investment of capital in the discharge

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of the duty, may secure to the sleeping-car company the same freedom from competition that it would have itself in discharging the duty. The restraint upon itself is properly proportioned to, and is only ancillary to, the main purpose of the contract, which is to secure proper facilities to the public. Exactly the same principle applies to similarly exclusive contracts with express companies, and stock-yard delivery companies. *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628; *Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461; *Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co.*, 31 U. S. App. 252, 14 C. C. A. 290, and 67 Fed. 35. The fact is that it is quite difficult to conceive how competition would be possible upon the same line of railway between sleeping-car companies or express companies. Such contracts involve the hauling of sleeping cars or express cars on each express train, the assignment of offices in each station, and various running arrangements, which it would be an intolerable burden upon the railroad company to make and execute for two companies at the same time. And the same is true of contracts with a stock delivery company. The railway company could not ordinarily be expected to have more than one general station for the delivery of cattle in any one town. It would only be required by the nature of its employment to furnish such facilities as were reasonably sufficient for the business at that place. There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these than there would be to a restriction upon a lessor not to allow the subject-matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege, when granted, is hardly capable of other than exclusive enjoyment. The public interest is satisfactorily secured by the requirement, which may be enforced by any member of the public, to [288] wit, that the charges allowed shall not be unreasonable, and the business is of such a public character that it is entirely subject to legislative regulation in the same interest.

Having considered the cases upon which the counsel for the defendants have relied to maintain the proposition that contracts having no purpose but to restrain competition and maintain prices, if reasonable, will be held valid, we must

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now pass in rapid review the cases that make for an opposite view.

In *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, all the coal dealers in the city of Lockport, N. Y., entered into a contract of association, forming a coal exchange to prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due protection of the parties to it against ruinous rivalry, and although no attempt was made to charge unreasonable or excessive prices, it was inimical to trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said Andrews, C. J. (page 264, 139 N. Y., and page 789, 34 N. E.):

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury. It would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

See, to the same effect, *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* (Com. Pl.) 14 N. Y. Supp. 277.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight, and to fix proportion of sales by each. Competition was not destroyed, because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void, as in illegal restraint of trade and competition, and tending to injure the public. In *Nester v. Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102, 45 brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet, as it was an article of merchandise,

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the contract was held void, as in restraint of trade, and tending to a monopoly.

In *Salt Co. v. Guthrie*, 35 Ohio St. 666, the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves, and agreed to sell only at prices fixed by a committee of their number. The supreme court of Ohio held the contract void. Judge McIlvaine, who delivered the opinion of the court, said:

[289] "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other Ohio cases which presented similar facts, and in which the same rule was enforced, are *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660, and *Hoffman v. Brooks*, 11 Wkly. Law Bul. 258.

In *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, two owners of steamboats running on the Kentucky river made an agreement to keep up rates, and divide net profits, to prevent ruinous competition and reduced rates. The contract was held void.

In *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. 1074, the grocery men in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid, because in restraint of trade, and tending to create a monopoly.

In *Craft v. McConoughy*, 79 Ill. 346, five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain, and to divide profits in a certain proportion. This was held void, as in restraint of trade, and tending to create a monopoly. In *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, articles of association entered into by only a part of the stenographers of Chicago to fix a schedule of prices, and prevent competition among their members and a

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consequent reduction of prices, was held void. The court said:

"A combination among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

As already said, this case is in direct conflict with *Collins v. Locke*, 4 App. Cas. 674, discussed above. To the same effect as *More v. Bennett* are *Ford v. Association*, 155 Ill. 166, 39 N. E. 651, and *Bishop v. Preservers Co.*, 157 Ill. 284, 41 N. E. 765.

In *Association v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, the suit was on a note given in pursuance of the secret rules of an association of 60 out of the 75 master masons in Milwaukee, by which all bids for work about to be let were first made to the association, and the lowest bidder was then required to add 6 per cent. to his bid, and, if the bid was more than 8 per cent. below the next lowest bidder, more than 6 per cent. might be added. Each member was required to pay to the association 6 per cent. of his estimates when due, for subsequent distribution. In declaring the contract void, the court said:

[290] "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exist no contract relations."

In *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, four powder companies of California agreed that each should sell at a price to be fixed by a committee of their representatives, and should pay over to the others the profits on any excess of sales over a fixed proportion of the total sales. The contract was held void.

In *Oil Co. v. Adoue*, 83 Tex. 650, 19 S. W. 274, five owners of cotton-seed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guarantied profits to the four others, and suit was brought on the guaranty. It was held void, as restraining trade, and tending to a monop-

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oly, even though the evidence failed to establish that it effected a monopoly.

In *Association v. Kock*, 14 La. Ann. 168, eight commercial firms in New Orleans holding a large quantity of cotton bagging entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that the contract was "palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Hilton v. Eckersley*, 6 El. & Bl. 47, it was held that an agreement between 18 cotton manufacturers to submit to the control of a committee of their number for 12 months the question as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade.

In *Urmston v. Whitelegg*, 63 L. T. (N. S.) 455, a case in the queen's bench division, before Day and Lawrence, JJ., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers' Association, which recited that the object of the association was to maintain the price of mineral water, and bound the members for 10 years not to sell at less than 9d. a dozen bottles, or at not less than any higher price fixed by the committee, on penalty of £10 for each violation. Day, J., said:

"If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, of the legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; but the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable. It is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employé. Where such relation exists between the parties, as

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already stated, restraints are usually enforceable if commensurate only with the reasonable pro- [291] tection of the covenant in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Arnot v. Coal Co.*, 68 N. Y. 558; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062; *People v. Refining Co.*, 54 Hun, 366, 7 N. Y. Supp. 406; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279; *Manufacturing Co. v. Klotz*, 44 Fed. 721; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188; *Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 530; *Harrow Co. v. Hench*, 83 Fed. 36; *Factor Co. v. A'ler*, 90 Cal. 110, 27 Pac. 36; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391.

In addition to the cases cited, there are others which sustain the general principle, but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a quasi public employment. They are *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798; *Stockton v. Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964; *West Va. Transp. Co. v. Ohio River Pipe-Line Co.*, 22 W. Va. 600; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13.

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Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay territory." Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the ca- [292] pacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to

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deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the pay territory; but, the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices, and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but, within that limit, they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below, upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact. The defendants were, by their combination, therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not [293] take the contract of association out of the an-

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nulling effect of the rule against monopolies. In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 16, 15 Sup. Ct. 255, Chief Justice Fuller, in speaking for the court, said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed \$15 a ton. It could have been delivered at Atlanta at \$17 to \$18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was \$24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe is sold is by contracts let after competitive

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bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. *Breslin v. Brown*, 24 Ohio St. 565; *Atcheson v. Mallon*, 43 N. Y. 147; *Loyd v. Malone*, 23 Ill. 41; *Wooton v. Hinkle*, 20 Mo. 290; *Phippen v. Stickney*, 3 Metc. (Mass.) 384; *Kearney v. Taylor*, 15 How. 494, [294] 519; *Wilbur v. How*, 8 Johns. 444; *Hannah v. Fife*, 27 Mich. 172; *Gibbs v. Smith*, 115 Mass. 592; *Swan v. Chorpenning*, 20 Cal. 182; *Gardiner v. Morse*, 25 Me. 140; *Ingram v. Ingram*, 49 N. C. 188; *Brisbane v. Adams*, 3 N. Y. 129; *Woodruff v. Berry*, 40 Ark. 251; *Wald*, Pol. Cont. 310, note by Mr. Wald, and cases cited. The case of *Jones v. North*, L. R. 19 Eq. 426, to the contrary, cannot be supported. The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy, and so brings it within that term of the federal statute.

The second question is whether the trade restrained by the combination of the defendants was interstate trade. The mills of the defendants were situated, two in Alabama, two in Tennessee, one in Kentucky, and one in Ohio. The invariable custom in sales of pipe required the seller to deliver the pipe at the place where it was to be used by the buyer,

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and to include in the price the cost of delivery. The contracts, as the answer of the defendants avers, were invariably made after public letting at the home, and in the state, of the buyer. The pay territory, sales in which it was the professed object of the defendants to regulate by their contract of association, included 36 states. The cities which were especially reserved for the benefit of the defendants were Atlanta and Anniston, reserved to the Anniston mill, in Alabama; New Orleans and Chattanooga, reserved to the Chattanooga mill, in Tennessee; St. Louis and Birmingham, reserved to the Bessemer mill, in Alabama; Omaha, reserved to the South Pittsburg mill, in Tennessee; Louisville, New Albany, and Jeffersonville, reserved to Dennis Long & Co., of Louisville; and Cincinnati, Newport, and Covington, reserved to the Addyston mill, in Ohio. Under the agreement, every request for bids from any place, except the reserved cities, sent to any one of the defendants, was submitted to the central committee, who fixed a price, and the contract was awarded to that member who would agree to pay for the benefit of the other members of the association the largest "bonus." In the case of the reserved cities, the successful bidder having been already fixed, the association determined the price and bonus to be paid. The contract of association restrained every defendant except the one selected to receive the contract from soliciting (in good faith) or making a contract for pipe with the intending purchaser at all, and restrained the defendant so selected from making the contract except at the price fixed by the committee. In cases of pipe to be purchased in any state of the 36 in pay territory, except 4, each one of the defendants, by his contract of association, restrained his freedom of trade in respect to making a contract in that state for the sale of pipe to be delivered across state lines; five of them agreeing not to make such a contract at all, and the sixth agreeing not to make the contract below a fixed price. With respect to sales in Ohio, Kentucky, [295] Tennessee, and Alabama, the effect of the contract of association was to bind at least three, sometimes four, and sometimes five, of the defendants not to make a contract at all in those states for the sale and

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delivery of pipe from another state; and if the job were assigned, as it might be, to one living in a different state from the place of the contract and delivery, its effect would be to bind him not to sell and deliver pipe across state lines at less than a certain price. It thus appears that no sale or proposed sale can be suggested within the scope of the contract of association with respect to which that contract did not restrain at least three, often four, more often five, and usually all, of the defendants in the exercise of the freedom, which but for the contract would have been theirs, of selling in one state pipe to be delivered from another state at any price they might see fit to fix. Can there be any doubt that this was a restraint of interstate trade and commerce? Mr. Justice Field, in *County of Mobile v. Kimball*, 102 U. S. 691, 696, said:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, a law of Tennessee, which imposed a tax on all "drummers" who solicited orders on samples, was held unconstitutional in so far as it applied to the drummer of an Ohio firm, who was soliciting orders for goods to be sent from Ohio to purchasers in Tennessee, on the ground that it was a tax on interstate commerce. In delivering the opinion of the court in that case, Mr. Justice Bradley said (page 497, 120 U. S. and page 596, 7 Sup. Ct.) that a tax on the sale of goods, or the offer to sell them before they are brought into the state, was clearly a tax on interstate commerce. He further said:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The principle thus announced has been reaffirmed by the court in *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655; in *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; in *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256; and in *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829. The point of these cases was emphasized by the distinction taken in *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, in which

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the validity of a law of Missouri, imposing a tax on peddlers, was in question. The plaintiff in error, convicted under the law of failure to pay the tax, was the selling agent of a New Jersey sewing machine manufacturing company, who carried the machine for sale with him in his wagon. It was held that in such a case, the machine having become part of the mass of property in the state, the tax on the peddler was not a tax on interstate commerce.

If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense,—such that the states are excluded by the federal constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicita- [296] tions, negotiations, and sales are contracts in restraint of interstate commerce. The anti-trust law is an effort by congress to regulate interstate commerce. Such commerce as the states are excluded from burdening or regulating in any way by tax or otherwise, because of the power of congress to regulate interstate commerce, must, of necessity, be the commerce which congress may regulate, and which, by the terms of the anti-trust law, it has regulated. We can see no escape from the conclusion, therefore, that the contract of the defendants was in restraint of interstate commerce.

The learned judge who dismissed the bill at the circuit was of opinion that the contract of association only indirectly affected interstate commerce, and relied chiefly for this conclusion on the decision of the supreme court in the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249. In that case the bill filed under the anti-trust law sought to enjoin the defendants from continuing a union of substantially all the sugar refineries of the country for the refining of raw sugars. The supreme court held that the monopoly thus effected was not within the law, because the contract or agreement of union related only to the manufacture of refined sugar, and not to its sale throughout the country; that manufacture preceded commerce, and although the manufacture under a monopoly might, and doubtless would, indirectly affect both internal and interstate commerce, it was not within the power of congress to regulate manufactures within a state

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on that ground. The case arose on a bill in equity filed by the United States under the anti-trust act, praying for relief in respect of certain agreements under which the American Sugar-Refining Company had purchased the stock of four Philadelphia sugar-refining companies with shares of its own stock, whereby the American Company acquired nearly complete control of the manufacture of refined sugar in this country. The relief sought was the cancellation of the agreements of purchase, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act. The chief justice, in delivering the judgment of the court, said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. * * * Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and it affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. * * * The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact [297] that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce."

The chief justice then refers to the prior case of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, in which it was held that logs were not made subjects of interstate commerce by the mere intent of the owner to ship them into another state, so that state taxation upon them could be regarded as a burden upon interstate commerce, until that intent had been carried so far into execution that "they had commenced their final

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movement from the state of their origin to that of their destination." *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, is also referred to. In that case it was held that a law of Iowa, which forbade the manufacture of spirituous liquor except for certain purposes, was not in conflict with the commerce clause of the federal constitution, although it appeared by proof that the liquor was to be manufactured only with intent to ship the same out of the state. The chief justice further said:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. * * * There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complaints to a decree."

We have thus considered and quoted from the decision in the Knight Case at length, because it was made the principal ground for the action of the court below, and is made the chief basis of the argument on behalf of the defendants here. It seems to us clear that, from the beginning to the end of the opinion, the chief justice draws the distinction between a restraint upon the business of manufacturing and a restraint upon the trade or commerce between the states in the articles after manufacture, with the manifest purpose of showing that the regulating power of congress under the constitution could affect only the latter, while the former was not under federal control, and rested wholly with the states. Among the subjects of commercial regulation by congress, he expressly mentions "contracts to buy, sell, or exchange goods to be transported among the several states," and leaves

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it to be plainly inferred that the statute does embrace combinations and conspiracies which have for their object to restrain, and which necessarily operate in restraint of, the freedom of such contracts. The citation of the case of *Coe v. [298] Errol* was apt to show that merchandise, before its shipment across state lines, was not within the regulating power of congress, and, a fortiori, that its manufacture was not; while *Kidd v. Pearson* clearly made the distinction between the absence of power in congress to control manufacturing merely because the manufacturer intends to add to interstate commerce with the product, and the power which congress has to prevent obstructions to interstate transportation in the product when made. But neither of these cases controls the one now under consideration. The subject-matter of the restraint here was not articles of merchandise or their manufacture, but contracts for sale of such articles to be delivered across state lines, and the negotiations and bids preliminary to the making of such contracts, all of which, as we have seen, do not merely affect interstate commerce, but are interstate commerce. It can hardly be said that a combination in restraint of what is interstate commerce does not directly affect and burden that commerce. The error into which the circuit court fell, it seems to us, was in not observing the difference between the regulating power of congress over contracts and negotiations for sales of goods to be delivered across state lines, and that over the merchandise, the subject of such sales and negotiations. The goods are not within the control of congress until they are in actual transit from one state to another. But the negotiations and making of sales which necessarily involve in their execution the delivery of merchandise across state lines are interstate commerce, and so within the regulating power of congress even before the transit of the goods in performance of the contract has begun.

The language of the chief justice in the last passages quoted above from his opinion, upon which so much reliance was placed by the circuit court and the defendants' counsel at the bar, is to be interpreted by the facts of the case before the court. The statement in the opinion that congress did not

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intend by the anti-trust act to limit and restrict the rights of persons and corporations in the mere acquisition, control, or disposition of property, or to regulate the prices at which such property should be sold, or to make criminal the acts of persons or corporations in the acquisition and control of property which the states of their residence or creation sanctioned or permitted, does not imply that congress did not intend to strike down any combination which had for its object the restraint and attempted monopoly of trade and commerce among a given number of states in specified articles of commerce, and the resulting power to regulate prices therein. The obstacle in the way of granting the relief asked in *U. S. v. E. C. Knight Co.* was (to use the language of the chief justice) that "the contracts and acts of the defendant related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations." The supreme court distinctly adjudged that "what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations." That the defendants in the present case combined and contracted with each other for the purpose of restraining trade [299] and commerce among the states covered by their agreement, in the articles manufactured by them, is too clear to admit of dispute. In the *E. C. Knight Co. Case* there was, the supreme court said, "nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." In the present case the proofs show that no one of the companies in this pipe-trust combination was allowed to send its goods out of the state in which they were manufactured except upon the terms established by the agreement. Can it be doubted that this was a direct restraint upon interstate commerce in those goods? To give the language of the opinion in the *Knight Case* the construction contended for by defendants would be to assume that the court, after having in the clearest way distinguished the case it was deciding from a case like the one at bar, for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which

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decided both. We cannot concur in such an interpretation of the opinion.

Counsel for the defendants also find in the language of Mr. Justice Peckham, in the case of *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 313, 326, 17 Sup. Ct. 540, an argument against our conclusion in this case. The question in that case was whether the anti-trust act applied to railroad companies which combined in establishing traffic rates for the transportation of persons and property. It was vigorously contended on behalf of the railroad companies that the act was never intended to apply to them, because congress had already provided for their regulation by the interstate commerce law. In meeting this position, Mr. Justice Peckham used the following language (page 313, 166 U. S., and page 548, 17 Sup. Ct.):

"We have held that the trust act did not apply to a company engaged in one state in the refining of sugar under circumstances detailed in the case of *U. S. v. E. O. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, because the refining of sugar under those circumstances bore no distinct relation to commerce between the states or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the states would leave little for the act to take effect upon."

Again, upon page 326, 166 U. S., and page 553, 17 Sup. Ct., Justice Peckham repeats the same idea:

"In the Knight Co. Case, *supra*. It was said that this statute applied to monopolies in restraint of interstate or international trade or commerce, and not to monopolies in the manufacture even of a necessary of life. It is readily seen from these cases that, if the act does not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative."

This is not a declaration that cases might not arise within the statute which were not combinations of common carriers in relation to interstate transportation. The language used means nothing more than that, if such combinations were excluded from the effect of the act, the great and manifest scope for the operation of a federal statute on such a subject would be denied to it. To give the language more weight would be to violate the first canon for the construction of a judicial opinion laid down by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 340, 399:

[300] "It is a maxim. not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which

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those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all cases is seldom completely investigated."

In re Greene, 52 Fed. 104, cited for the defendants, is to be distinguished from the case at bar in exactly the same way as the Knight Co. Case. The indictment against Greene, drawn under the anti-trust act, charged him with being a member of a combination to acquire possession and control of 75 per cent. of the distilleries of the country, for the purpose of fixing the price of whisky, and controlling the trade in it between the states. The immediate object of the combination was a monopoly in manufacture. The effect upon interstate trade in whisky was as indirect as was the monopoly of the refining of sugar in the Knight Co. Case upon interstate trade in that article.

The case of *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 35 U. S. App. 16, 14 C. C. A. 14, and 66 Fed. 637, cannot be regarded as an authority upon either of the questions considered in this case, because of the division of opinion among the judges. It was a suit brought by a watch manufacturing company against 20 other companies to recover damages for a boycott of the plaintiff. The averment was that the defendants had agreed not to sell any goods manufactured by them to any person dealing with the plaintiff, and had caused this to be known in the trade, and that they fixed an arbitrary price for the sale of their goods to the public, and, because plaintiff's competition interfered with their maintaining this price, they were using the boycott against plaintiff, to stifle competition. The pleadings were not drawn with care to bring the case within the anti-trust law. The questions arose on demurrer to the bill. Judge Lacombe held that the facts stated gave rise to no cause of action; Judge Shipman held that the averments were not sufficient to show that the trade restrained was interstate; and Judge Wallace dissented, on the ground that a cause of action was sufficiently stated, and that the restraint was upon

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interstate commerce. These varying views decided the case, but they certainly furnish no precedent or authority.

There is one case which seems to be quite like the one at bar. It is the case of *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. 432, a decision by Judge Key at the circuit. The owners of coal mines in Kentucky entered into a contract of association with coal dealers in Nashville, by which they agreed that the mine owners should only sell to dealers who were members, and the members should only buy from mine owners who were members, and that the dealers should sell at certain fixed prices, of which the mine owners should receive a proportionate part, after payment of freight, and that prices might be raised by a vote of the association, in which case the addition to the price should be divided between the dealers and [801] the mine owners. The contract recited that it was intended to establish and maintain the price of coal at Nashville. It was held to be an attempt to create a monopoly in the interstate trade in coal between Kentucky and Nashville, Tenn., and it was enjoined.

It is pressed upon us that there was no intention on the part of the defendants in this case to restrain interstate commerce, and in several affidavits the managing officers of the defendants make oath that they did not know what interstate commerce was, and, therefore, that they could not have combined to restrain it. Of course, the defendants, like other persons subject to the law, cannot plead ignorance of it as an excuse for its violation. They knew that the combination they were making contemplated the fixing of prices for the sale of pipe in 36 different states, and that the pipe sold would have to be delivered in those states from the 4 states in which defendants' foundries were situate. They knew that freight rates and transportation were a most important element in making the price for the pipe so to be delivered. They charged the successful bidder with a bonus to be paid upon the shipment of the pipe from his state to the state of the sale. Under their first agreement, the bonus to be paid by the successful bidder was varied according to the state in which the sale and delivery were to be made. It seems to us clear that the contract of association was on its face an extensive scheme to control the whole commerce

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among 36 states in cast-iron pipe, and that the defendants were fully aware of the fact whether they appreciated the application to it of the anti-trust law or not.

Much has been said in argument as to the enlargement of the federal governmental functions in respect of all trade and industry in the states if the view we have expressed of the application of the anti-trust law in this case is to prevail, and as to the interference which is likely to follow with the control which the states have hitherto been understood to have over contracts of the character of that before us. We do not announce any new doctrine in holding either that contracts and negotiations for the sale of merchandise to be delivered across state lines are interstate commerce (see cases above cited), or that burdens or restraints upon such commerce congress may pass appropriate legislation to prevent, and courts of the United States may in proper proceedings enjoin. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. If this extends federal jurisdiction into fields not before occupied by the general government, it is not because such jurisdiction is not within the limits allowed by the constitution of the United States.

The prayer of the petition that pipe in transportation under the contract of association be forfeited in a proceeding in equity like this is, of course, improper, and must be denied. The sixth section of the anti-trust act, after providing that property owned and in transportation from one state to another or to a foreign country under a contract inhibited by the act "shall be forfeited to the United States," continues "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." This requires a like procedure to that prescribed in sections [302] 3309-3391, Rev. St., and involves a trial by jury. The only remedy which can be afforded in this proceeding is a decree of injunction.

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder.

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[465] MOORE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1898)

[85 Fed., 465.]

JURISDICTION OF FEDERAL COURTS—ADMISSION OF TERRITORY AS STATE—STATUTE.—In 1895 the plaintiff in error was indicted, with others, in a district court of the territory of Utah, under section 8 of the act of July 2, 1890 (26 Stat. 209), which declares illegal "every * * * combination * * * in restraint of trade or commerce in any territory." In January, 1896, Utah was admitted as a state, and thereafter the case was transferred to the federal court for the district of Utah, where, after hearing on demurrer to the indictment, the plaintiff in error was tried and convicted. *Held*, on writ of error, that neither under the act of congress authorizing Utah to form a state government (28 Stat. 111, 112), nor the constitution of Utah (article 24, § 7), nor by other legislation, was jurisdiction conferred upon the federal court to proceed with the case.*

SAME—*Held*, further, that the case did not come within the provisions of Rev. St. § 13, regulating the effect of the repeal of statutes, for the admission of Utah as a state did not operate to repeal the act of July 2, 1890, which still applies to the territories of the United States.

In Error to the Circuit Court of the United States for the District of Utah.

R. Harkness, George Sutherland, and Waldemar Van Cott, for plaintiff in error.

J. W. Judd, United States Attorney, and *W. L. Maginnis*, Assistant United States Attorney.

Before **BREWER**, Circuit Justice, **SANBORN**, Circuit Judge, and **RINER**, District Judge.

RINER, District Judge.

November 4, 1895, the plaintiff in error, with others, was indicted in the district court within and for the Third judicial district of the territory of Utah, Salt Lake county, for unlawfully engaging in a combination in restraint of trade and commerce in that territory. The indictment charged that the defendants therein named, "on the 22d day of Octo-

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ber in the year of our Lord 1895, in the district and territory aforesaid, and within the jurisdiction of this court, did willfully and unlawfully engage in a combination in restraint of trade and commerce in said territory in this: That the said defendant E. L. Carpenter, being then and there the agent in Salt Lake City, Salt Lake county, territory of Utah, of the Pleasant Valley Coal Company, a corporation engaged in mining coal, and selling the same at wholesale to dealers in coal in said Salt Lake City, and the said defendant F. H. Moore, being then and there the agent of the Union Pacific Coal Company, a corporation engaged in mining coal and selling the same at wholesale to dealers in coal in said Salt Lake City, and each and all of the said defendants other than said Carpenter and said Moore being then and there engaged in the business of buying coal and selling the same at retail in said Salt Lake City, and each and all of said defendants except said Carpenter and said Moore being then and there members of an association designated and known as the Salt Lake [466] Coal Exchange, said Salt Lake Coal Exchange being a voluntary association of nearly all of the dealers in coal at retail in said Salt Lake City, and not a corporation; each and all of the defendants did then and there combine together to prevent any person engaged in the business of buying coal and selling the same at retail in said Salt Lake City, and not a member of said exchange, and any person desiring to engage in such business in said city, and not a member of the said coal exchange, from purchasing coal from said Union Pacific Coal Company and from the said Pleasant Valley Coal Company at as low a price as that for which the same kind of coal was being sold by said corporations to members of said Salt Lake Coal Exchange, and to make the price of coal from such corporations to dealers in coal at retail in said city, and persons desiring to engage in dealing in coal at retail in said city, who are not members of said exchange, so great as to prohibit and prevent them purchasing coal of said corporations, and selling the same at retail in said city, and to unlawfully raise, augment, and increase the price of coal at retail in said Salt Lake City, and to destroy free competition in the sale of coal in said city, and to compel the consumers of coal in said city to pay therefor

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the prices fixed by the said coal exchange; that in pursuance of said combination said F. H. Moore, as agent of said Union Pacific Coal Company, did on the 23d day of October, 1895, refuse to sell to one T. P. Lewis, who was then and there desirous of engaging in the business of buying coal and selling the same at retail in said Salt Lake City, and who was not a member of said coal exchange, a carload of what is known as 'Rock Springs coal,' which said Moore, as said agent, was selling to the members of the said coal exchange in car-load lots at three and $\frac{75}{100}$ dollars (\$3.75) a ton, except at the price of five (\$5) dollars per ton, which was then the retail price of said coal in said city, and refused to sell said coal at all except to the members of said exchange; and in pursuance of said combination the said Carpenter, as agent of said Pleasant Valley Coal Company, in said county, on the said 23d day of October, 1895, refused to sell to said T. P. Lewis, who was then and there desirous of engaging in the business of buying coal and selling the same at retail in said Salt Lake City, and who was not a member of said exchange, a car load of coal, said Carpenter having said coal for sale as said agent, for the reason that said Lewis was not a member of said exchange,—against the peace, and contrary to the form of the statutes of the United States in such case made and provided." December 14, 1895, the defendants were arraigned in the territorial court, and severally pleaded not guilty to this indictment. January 4, 1896, Utah was admitted into the Union as a state upon an equal footing with the original states. President's Proclamation, 29 Stat. 876. Thereafter this case was transferred to the circuit court of the United States for the district of Utah. November 11, 1896, the defendants obtained leave of court (counsel for the United States consenting thereto) to withdraw their pleas of not guilty theretofore entered in the territorial court, and to file a demurrer to the indictment upon the grounds (1) that the indictment charged no offense; (2) that it set out no means by which the alleged combination was to [467] be effected; (3) for the reason that it stated no act or fact to show that the alleged combination was in restraint of trade; (4) that the acts charged as overt acts were not shown

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to be in pursuance of any means to be employed; (5) that the prosecution had abated by the admission of the territory of Utah as a state. The demurrer was, as the record shows, sustained to that part of the indictment which charges a combination to raise the price of coal in Salt Lake City, and was overruled as to the remainder of the indictment. Thereupon each of the defendants entered a plea of not guilty, and on the day following—November 12, 1896—the case was tried, the trial resulting in a verdict of guilty as to all of the defendants. The bill of exceptions shows that when the testimony was concluded, and before the argument to the jury began, the defendants requested the court to instruct the jury to return a verdict of not guilty. This request was overruled by the court, and the defendants excepted. Motions in arrest of judgment and for a new trial were severally made and overruled, and on the 19th of November, 1896, the plaintiff in error was sentenced, by the court, to pay to the United States the sum of \$200 as a fine, and one-half of the costs of the case, taxed at \$88.60. He thereupon sued out this writ of error.

No questions in relation to combinations or conspiracies in restraint of interstate trade or commerce, or trade or commerce between one territory and another territory, or between a territory and a state, or between a state or a territory and a foreign nation, arise in this case. The indictment seeks only to charge the defendants with unlawfully entering into a combination in restraint of trade and commerce in the territory of Utah, and is based upon the following provision of an act of congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890:

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States * * * is hereby declared illegal. * * *" 26 U. S. Stat. 209.

While the constitution confers upon congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," and "to regulate commerce with foreign nations and among the several states and with the Indian tribes," it does

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not confer upon it the power to regulate trade or commerce within a state, or to legislate in respect thereto; wherefore the provision of the statute above quoted is confined to contracts or combinations in restraint of trade in a territory. The plaintiff in error now insists that the provision of section 3 of the act under which this indictment was found became inoperative in Utah when Utah was admitted into the Union as a state, and that the circuit court for that district had no jurisdiction to proceed in the case. The courts of the United States being courts of limited jurisdiction, with power to take cognizance of matters civil or criminal only as the power so to do is conferred upon them by statute, it becomes important to determine at the outset whether the circuit court had jurisdiction to try the offense with which the plaintiff in error stands charged in this indictment. When Utah was admitted [468] into the Union as a state on an equal footing with the original states, the territorial government within the boundaries of the new state was at an end. Its civil and political powers were transferred to other officers; those of peculiarly internal character to officers of the new state; those which bore any relation to the national system of government, of which the state formed a part, to officers holding commissions under that system, and possessing only the powers derived from their commissions. As one of the states of the Union and in virtue of that character forming one of the districts of the United States, the district of Utah, and the circuit court sitting in that district, would possess no peculiar jurisdiction or authority; none which did not appertain to other districts and the circuit courts having cognizance of matters within those districts. In the case before us the plaintiff in error was tried and convicted, in the circuit court of the United States for the District of Utah, upon an indictment charging him with the violation of an act of congress defining an offense which was an offense only when the agreement or combination complained of related to trade or commerce in a territory. The indictment was returned by a territorial grand jury, and filed in a territorial court during the existence of a territorial form of government. If, therefore, the circuit court possessed power and authority to try this case, it was because of the existence of

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legislation continuing the provision of the statute defining the offense set out in the indictment in force after the admission of the state, and specially conferring upon the circuit court for that district jurisdiction in such cases. That there can be no valid judgment pronounced upon conviction in a criminal case, unless the law creating the offense be at the time in existence, is well settled. *The Irresistible*, 7 Wheat. 551; *U. S. v. Tynen*, 11 Wall. 95. In *Yeaton v. U. S.*, 5 Cranch, 281, Chief Justice Marshall said:

"It has been long settled on general principles that, after the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

By its terms, the provision of the statute under which this indictment was found applies only to the territories of the United States, and, while it may yet be in full force within the territories, it is clear that no prosecution could be maintained under it for entering into a combination or conspiracy in restraint of trade in Utah after the date of her admission as a state. *Permoli v. First Municipality*, 3 How. 589. When Utah became one of the states of the Union, this statute ceased to be in force within its boundaries, unless, by appropriate legislation, it was continued in force for the purpose of prosecuting violations thereof committed during the existence of a territorial form of government.

The act of congress authorizing Utah to form a state government, after providing that the state of Utah should constitute one judicial district, to be called the "District of Utah," and providing the time and place for holding the circuit and district courts of the United States therein, and conferring upon the circuit and district courts for that district, and the judges thereof, the same powers and jurisdiction, and requiring them to perform the same duties, possessed and required to be performed by the other circuit and district courts and judges of the United States, also provided:

"That the convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah at the time of the admission of said state into the Union, to such courts as shall be established under the constitution to be thus formed, or to the circuit or district court of the United States for the

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district of Utah; and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts according to the laws thereof, respectively."

"And the laws of the United States shall have the same force and effect within the said state as elsewhere within the United States." 28 Stat. 111, 112.

Under the authority conferred upon the constitutional convention by the enabling act, a schedule annexed to the constitution of the state provided that:

"All actions, causes, proceedings and matters which shall be pending in the district courts of the territory of Utah, at the time of the admission of the state into the Union, whereof the United States circuit and district courts might have had jurisdiction had there been a state government at the time of the commencement thereof, respectively, shall be transferred to the proper United States circuit and district courts, respectively, and all files, records, indictments and proceedings relating thereto, shall be transferred to said United States courts." Const. Utah, art. 24, § 7.

The above provisions of the enabling act and the schedule comprise the legislation relating to the transfer and trial of cases pending in the district courts of the territory at the time Utah was admitted as a state, and for the continuation of the laws of the United States therein after her admission. Clearly, no peculiar jurisdiction or authority is conferred upon the circuit court, for that district, by this legislation; on the contrary, the enabling act would seem to inhibit and exclude the exercise of any extraordinary or peculiar power either by the circuit or district courts within the newly created district. That act provides:

"That the circuit and district courts for the district of Utah, and the judges thereof respectively, shall possess the same powers and jurisdiction and perform the same duties possessed and required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations."

There is no provision of the enabling act, nor any other general or special act of congress, continuing the provision of the act of July 2, now under consideration, in force in Utah after the admission of the state; neither is there any statute which, in terms, provides for the transfer to and the trial of cases arising under that act in the circuit court for that district. This case was transferred to and tried in that court for the reason, doubtless, that it was considered one of the cases which the enabling act declares shall not abate by reason of any change in the courts, but shall be proceeded

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with in the state or United States courts according to the laws thereof; and, as the indictment charged the defendants with violating a law of the United States, that the case came within the provisions of the enabling act, and also within the provision of the schedule annexed to the consti- [470] tution authorizing the transfer of cases whereof the circuit court might have had jurisdiction had there been a state government at the time of the commencement thereof. We do not think the case is included within either of these provisions. There are some acts which congress may by law designate as a crime against the general government or against the operations of government which affect every citizen, whether of a state or territory; such as treason, illegally holding office, violations of the postal laws, counterfeiting, false impersonation in procuring naturalization, presenting false claims against the government, etc. The federal laws defining these and kindred offenses operate upon all citizens of the United States, and that they reside in a state constitutes no exemption from a prosecution for a violation thereof in the courts of the United States, for jurisdiction is expressly conferred by statute upon the federal courts. As applied to criminal laws, it is these laws of the United States that the enabling act declares shall have the same force and effect within the state of Utah as elsewhere within the United States; and it is prosecutions for violations thereof which, under the provisions of that act, are not to abate upon the admission of the state by reason of any change in the courts, but are to be transferred from the territorial district court, a court having jurisdiction in such cases during the existence of a territorial form of government, to the circuit and district courts, courts having jurisdiction in such cases after the admission of the state. That the provisions of the enabling act were so understood and construed by the constitutional convention is evidenced by the fact that in the schedule (annexed to the constitution) providing for the transfer of causes to the federal courts it provides only for those cases "whereof the United States circuit and district courts might have had jurisdiction had there been a state government at the time of the commencement thereof," and this is not such a case. If there had been a state government at the date of this indict-

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ment, no indictment could have been returned, for the reason that there would have been no law in force in the state of Utah defining such an offense.

Neither do we think the present case comes within the provisions of section 13 of the Revised Statutes. That section reads as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

It is clear from the language of the section that it applies only to cases where the statute defining an offense has been repealed. The act of July 2d was not repealed by the enabling act, for it yet applies to the territories of the United States. It ceased to be in force in Utah only because it was superseded by the constitution upon the admission of the state.

Our conclusion is that no power existed by law in the circuit court for the district of Utah which did not appertain to the circuit courts in other districts; that the power and jurisdiction claimed for the circuit court in this case is a peculiar and extraordinary power, and [471] does not belong to it regularly by its constitution; that no such power has been bestowed upon it by any special legislation, and could not, therefore, be legally and properly exercised by it. In the view we have taken of this case it becomes unnecessary to consider the other assignments of error set out in the record. The judgment of the circuit court must be reversed, and the case remanded to that court, with instructions to dismiss the indictment.

[407] GULF, C. & S. F. RY. CO. ET AL. v. MIAMI S. S. CO.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1898.)

[86 Fed., 407.]

CARRIERS—CONNECTING LINES—PREPAYMENT OF FREIGHT.—A common carrier engaged in interstate commerce may at common law, and

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under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier.*

SAME—THROUGH TRANSPORTATION—JOINT RATES AND BILLING.—Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier.

SAME—LAWS OF TEXAS.—Rev. St. Tex. 1895, arts. 4536, 4537, 4539, do not apply to interstate commerce, because the power to regulate such commerce is vested in congress, and has been fully exercised by the enactment of the interstate commerce law.

SAME—ANTI-TRUST LAW.—Under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," the only remedy given to any other party than the government of the United States is a suit for threefold damages, costs, and attorney's fees, and the only party entitled to maintain a bill of injunction for an alleged breach of the act is the United States, by its district attorney, on the authority of the attorney general.

APPEAL from the Circuit Court of the United States for the Eastern District of Texas.

James Hagerman, T. S. Miller, N. A. Stedman, and J. W. Terry, for appellants.

M. C. McLemore, John Neethe, and F. Chas. Hume, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge.

The bill in this case alleges that:

"The Miami Steamship Company, a corporation duly incorporated under and by virtue of the laws of the state of New York, complaining of the Gulf, Colorado & Santa Fé Railway Company, the International & Great Northern Railroad Company, and the Missouri, Kansas & Texas Railway Company of Texas, in this behalf says: That the Gulf, Colorado & Santa Fé Railway Company is a corporation duly incorporated under and by virtue of the general and special laws of the state of Texas, having its general offices at Galveston, Texas, in said state, and of which L. J. Polk is general manager;

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that it is a component part of, and subsidiary to, the Atchison, Topeka & Santa Fé Railroad Company, and what is commonly known as the Santa Fé System; that it [408] has and maintains traffic relations with connecting lines, and is engaged in the traffic of state and interstate commerce. That the International & Great Northern Railroad Company is a corporation duly incorporated under and by virtue of general and special laws of the state of Texas, and has its general office at Palestine, in the state of Texas, and of which Leroy Trice is general superintendent; that it is a component part of, and subsidiary to, what is known commonly as the Missouri Pacific, or Gould, System, and is engaged in traffic of state and interstate commerce. That the Missouri, Kansas & Texas Railway Company of Texas is a corporation duly incorporated under and by virtue of general and special laws of the state of Texas, and has its general offices at Dallas, Texas, and of which A. A. Allen is general manager; that it is a component part of, and subsidiary to, what is commonly known as the Missouri, Kansas & Texas Railway System; that it has and maintains traffic relations with connecting lines, and is engaged in the traffic of state and interstate commerce. That said three railway companies are the only trunk lines of road running through the state of Texas, and connected by close traffic relations with the systems of railway reaching points beyond the state of Texas and in states and territories north and west of Texas, a market and field from which and to which large quantities of freight are consigned and shipped, and having termini at Galveston, Texas, connecting with the Mallory Line and your orator. That your orator is engaged as a common carrier for hire in the traffic of state and interstate commerce, owning and operating a line of steamships between the ports of New York, in the state of New York, and Galveston, in the state of Texas; and at Galveston, Texas, it connects with the lines of the railway companies hereinbefore named. That its steamships are commodious, safe, and seaworthy, and amply fitted for the purpose of transporting freight between the points named. That in the city of New York it connects with all the lines of railway running into said city, and has in the said port and at the port of Galveston wharves and sheds sufficient to accommodate and protect all freights delivered to it, and has in every respect facilities sufficient to serve the public with dispatch, comfort, and safety. That it has been operating its said line of steamships between said ports since the 15th day of July, 1897, and has done a large business in every respect satisfactory to its patrons. That since said day your orator has received from and delivered to said railroad companies large quantities of freight on its wharf in the city of Galveston, destined to or shipped from points on the several lines of said railroads and their connecting lines, and it has received from and granted to said railroad companies the same rights, privileges, conditions, and exactions as to or by any other line of steamships in similar service as your orator granted or demanded in the interchange of freight. That there is one, and only one, other line of steamships which plies between Galveston and New York, which is owned and operated by the New York & Texas Steamship Company, commonly known and called the Mallory Line, and which hereinafter will be referred to as the Mallory Line. That said line of steamships is engaged in exactly similar service as those of your orator, and said line has at New York and at Galveston wharves and sheds which connect with the several lines of railway running into said cities. That said Mallory Line has been in operation between said ports for a number of years, and for several years prior to the time your orator's line of steamships was put in operation had no competitor for the business between said ports. That the accommodations of said Mallory Line and of your

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orator for the reception and delivery of freight, in unloading and loading vessels, in receiving and delivering freight, are in every respect similar and equal. Their respective wharves connect with the several lines of the respondents in the same and similar manner, and the same and similar accommodations prevail for the reception and delivery of freight, for the loading and unloading of cars. That the cost of loading and unloading cars at the respective wharves is the same, and the respondents have contracts for loading and unloading cars at the respective wharves for the same price. That it has been, and is now, the established custom and usage by and between said railroad companies and the Mallory Line and your orator, in the interchange of freight, for the line over which freight might be routed to advance to the line over which the freight originated the charges attached to such freight up to the time of delivery to the steamship company or railroad company over which it was to be forwarded to destination. [409] That it is, and has been, an established custom and usage between the respondents and the Mallory Line and your orator since it has been in business, with reference to freight originating at New York or beyond, and destined to points in Texas on the lines of railway operated by respondents, for the Mallory Line and your orator to bill such freight through from its point of origin to the point of destination at a through rate previously agreed upon, but on equal, exact, and similar conditions with reference to both steamship lines, and for said railroads to pay to the steamship company delivering the freight at Galveston the freight charges earned by it in transporting the freight from point of origin to Galveston under such agreement, and to receive the freight tendered by such steamship company, and forward same to its destination under such agreement. And it is, and has been, an established custom and usage between the respondents and the Mallory Line and your orator, with reference to freight originating at points on the lines of the several railway companies in Texas destined for New York or to points beyond on lines of railway connected with the Mallory Line and your orator at that point, to bill freight from point of origin to point of destination at a through rate previously agreed upon, and at the same and similar rates and under the same exact and similar conditions, and for the steamship company receiving such freight to pay to the railroad company delivering the freight at Galveston the charges for freights earned by said railroad company in transporting the freight from point of origin to Galveston, Texas, under said agreement, and to receive the freight tendered by the railroad company, and forward the same to New York, if that be the point of destination, or, if beyond, to deliver same to connecting lines reaching said point, under said agreement. This custom and usage is established in all cases, except in the case of perishable goods, when the custom does not apply.

"That there is a combination of railway companies and steamship companies known and designated by the name of the Southwestern Freight Bureau, composed of and by the principal railway systems in the southwestern portion of the United States, of which the respondents the Southern Pacific Company, the Morgan Steamship Company, and the Cromwell Steamship Company, which latter steamship companies operate lines of steamship between the ports of New Orleans, in the state of Louisiana, and New York, and the Mallory Line, are members, organized for the purpose of controlling freight of interstate commerce in that portion of the United States reached by the said railroads and their connections by rail and water. That heretofore, to wit, on or about the 31st day of January, 1908, at a meeting of said freight bureau, called for that purpose in the city of New York, state of New York, at which representatives of the lines herein com-

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plained of,—the Mallory, the Morgan, and the Cromwell Steamship Lines, thereunto duly authorized,—were present, said railroads entered into a conspiracy with said steamship companies against your orator, wherein and whereby it was and is attempted to prevent your orator from carrying on its business as a common carrier in interstate commerce. That said railroad companies entered into an agreement with said Mallory Line, the Cromwell Line, and the Morgan Line in substance and in effect as follows: 'That all through rates and divisions via Gulf ports be discontinued from and to domestic ports with steamer lines not members of this association, and all interchange of traffic with such lines be discontinued as far as possible. That in consideration of assistance given the Mallory Line by the adoption of this agreement the Mallory Line is to cancel all existing contracts or special arrangements with the Kansas City, Pittsburg & Gulf on Missouri river business, and hereafter abide by rates and regulations fixed by this association. That all rates less than authorized association basis between Texas points and all territories be withdrawn February 15th, and that prepayment of freight be demanded from the steamer lines not members of this association.' That your orator is the only steamer line running between New York and any of the Gulf ports not a member of the said association. That by the terms of said agreement respondents agreed to accept from and deliver to said lines members of said association freight upon conditions which they would not grant to your orator, or any other competitor in this field, not a member of said freight bureau. That by the terms of said agreement said railroad companies bound themselves to break off all relations with your orator except those coupled with such discriminating conditions as to amount to a practical refusal to transact any business [410] with your orator. That pursuant to said agreement, and in the execution thereof, said railroad companies have served upon your orator notices in substance and effect that on and after February 15, 1898, they will not accept any freight from your orator destined to points on their respective lines, or points reached by their connections, unless the freights on same be prepaid; nor will they accept any freight consigned to your orator except upon same and similar conditions; that they will no longer permit your orator to bill through freight as is and has been heretofore the custom between said railroad companies and the only two lines running into Galveston from New York, but will require and demand of your orator on all freight shipped by its line full local rate from Galveston to point of destination; nor will they accept any freight consigned from New York or to points on the connecting line at that place routed by your orator's line except that full locals be paid to Galveston, and freight rebilled at that point to point of destination. Your orator alleges that these conditions, exactions, and demands will apply only to your orator, and that they will not apply to the Mallory Line, or to any other line running from New York to Gulf ports, members of the said freight bureau. But, on the contrary, it alleges that said lines will continue to act in conjunction with the Mallory Line as a member of said association, as is and has been the custom heretofore, and as hereinbefore alleged and set forth. That by so doing the said International & Great Northern Railroad Company, the Missouri, Kansas & Texas of Texas, and the Gulf, Colorado & Santa Fé threaten and intend to unlawfully and willfully violate the express provisions of the laws of the United States; and in carrying into effect the threats made your orator will be prevented from engaging and continuing in the traffic of interstate commerce, and now carried on by it. It will be required to accept and transport freight at a price largely below the cost of carriage in order to compete in the same field with the Mallory Line and other steamship lines having connections under

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similar circumstances, members of said association. That such steps on the part of said railroad companies will be, in effect, granting to the Mallory Line and other steamer lines similarly engaged, members of said association, undue and unreasonable preference over your orator, and will subject it to undue and unreasonable prejudice and disadvantage.

"Your orator further alleges that the said railroad companies and the Mallory Line have entered into an agreement and compact by which said railroad companies agree to accept on and after February 15, 1898, freight from the Mallory Line originating at New York, and destined to points on their line in the state of Texas, or to points of connecting roads, on a through rate which is less than the combination of local rates which will be demanded of your orator on and after said date; and they have agreed further that, in the event freight originating outside of New York City, for the carriage of which to New York the Mallory Line or consignors of said freight would be required to pay not more than thirty-five cents per hundred pounds; that the cost of such transportation to New York so required shall be absorbed, and all lines participating in the carriage of such freight from New York shall prorate such cost of carriage to New York with the Mallory Line, and the Mallory Line will be called upon to pay only thirty-five per cent. of such charge. The said agreement affects all freights originating outside of New York City, and imposes upon your orator in its competition for such freight the amount, at least, rebated to the Mallory Line as its pro rata of the arbitrary paid out in getting said freight to New York. That said roads have agreed with said Mallory Line that upon all freights transported by it from New York to Galveston, and from Galveston to New York, destined to points on the lines of the several railways outside of Galveston, shall receive thirty-five per cent. of the through rate, the balance to be prorated upon an agreed basis between the participating railroads. That said railroads will not grant, but, on the contrary, will refuse to grant, to your orator equal rights and privileges with the Mallory Line as above set forth, but exact and demand that all freight routed via your orator's line, whether it originates at New York or beyond, or at points on respondents' lines of railway, shall be required to pay the total of local rates, which would be largely in excess of the amount required and exacted of the Mallory Line or other members of such association, and that all freights routed over your orator's line will have to pay a higher rate than if the same were routed by way of the Mallory Line. That, [411] as hereinbefore alleged, the service, accommodation, connections, and facilities of the Mallory Line and those of your orator are in every sense equal, exact, and similar; and that by the imposition on the part of the railroads herein complained of your orator will be caused to suffer great and irreparable injury, its business prostrated, and probably prevented from continuing in its line of business. That at law there exists no plain, full, complete, and adequate remedy; that your orator believes, and it so charges, that respondents intend to and will enforce said threats and demands on and after February 15, 1898, and thereby divert business and freight from it to the Mallory Line, and prevent it from competing with said line in the transportation of state and interstate commerce.

"Wherefore your orator prays that your honors will grant your most gracious writ of injunction restraining the respondents, and each of them, their agents and servants, from in any way interfering with the business of your orator as it has been heretofore and is now being carried on between the respondents and your orator in the manner and by the means hereinbefore alleged, and restraining them from discriminating against your orator in the making and granting of

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through rates, restraining them, and each of them, from carrying out the agreement between them and others in so far as it affects your orator, and commanding them to afford to your orator the same facilities, and to accept freight under the same conditions, as by them extended and granted to the other connecting steamship lines between Galveston and New York, and commanding them to make the same rate of freight on interstate and through business, and to allow your orator the same pro rata of through rates, as is given to the Mallory Line; that upon the final hearing had said injunction be made permanent; and for such other and further and general relief as to your honors may seem meet and proper."

On February 12, 1898, this bill was exhibited to one of the judges of the circuit court for the Eastern district of Texas, who thereupon ordered:

"Upon consideration of the within petition, the same is set down for hearing before me at Galveston, Texas, on February 21, 1898, at 10 o'clock a. m. of said day, at the United States court house, and in the meantime respondents are directed to maintain with complainant the same relations with respect to rates, divisions, and freights as are by them granted to the Mallory Line."

At the time and place appointed the defendants appeared by counsel. The Missouri, Kansas & Texas Railway Company of Texas submitted an answer, which, after certain admissions and denials not necessary to note, proceeded thus:

"This defendant, for full and complete answer to the bill of complainant filed herein, shows: It is engaged in the operation of lines of railway lying wholly in the state of Texas, with a mileage of about nine hundred and seventy-six miles, extending from Galveston, Texas, in a northwesterly direction to the north line of the state of Texas near Denison, in Grayson county, Texas, together with certain branches in the state of Texas, and that it reaches with its own lines many of the most important cities in Texas, such as Houston, Waco, Ft. Worth, Dallas, Denison, Sherman, and others, and connects with all the principal railroads in said state, and that its business consists of the transportation of passengers, freight, mail, and express, and that such business constitutes international, interstate, and state commerce, and that such commerce in the natural course of business moves in all directions over this defendant's lines of railway and its connections. It is to the best interests of this defendant, as well as to the best interests of its connecting lines and the general public which they serve, as the defendant believes and avers, that this commerce be carried at reasonable, open, published, and stable rates, filed with the interstate commerce commission where the commerce is interstate, and with the railroad commission of the state of Texas where the commerce is state. It is likewise to the interest of this defendant, its connections, and the public generally, that it should have a joint through tariff from points on its lines and connections to New York in connection with some steamship line from Galveston; and this defendant shows that recently, and a short time before the filing of the bill [412] herein, it effected an arrangement with the New York & Texas Steamship Company, hereinafter and in the bill referred to as the 'Mallory Line,' by which a through rate has been agreed upon between New York and what is known as 'Atlantic Seaboard Territory' and points on this defendant's lines and its con-

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nections, and in conformity thereto a joint through tariff has been adopted by this defendant and the Mallory Line and others, and filed with the interstate commerce commission, a copy whereof is hereto appended, marked 'Exhibit A,' for convenient reference, and made a part hereof; and that the rates therein agreed upon, published, and established are reasonable and just, and under the provisions of the act of congress to regulate interstate commerce constitute the maximum and the minimum charges which can be made by this defendant and the Mallory Line for the transportation of freight between the points named. This defendant shows that prior to July 15, 1897, when the complainant first entered its ships in the service between Galveston and New York, this defendant, in connection with other railroads of the Southwest, had in force certain joint tariffs from New York to points on its line and those on its connections, by the Gulf ports, but the assent of the steamship companies was never given to such joint tariffs by filing the same with the interstate commerce commission, or by general adoption thereof, and the steamship companies were bound by said through tariffs only when they accepted shipments of freight thereunder. That almost immediately after the complainant entered into the New York and Galveston trade a rate war broke out as to Texas traffic between it and the Mallory Line, which resulted in a notice being given by this defendant to the complainant and the Mallory Line that it would charge them its regular established rates from and to Galveston on Texas traffic; and since such notice was given this defendant has charged on all freight to and from said steamship lines its regularly established rates to and from Galveston; and the Mallory Line and the complainant have at all times allowed such rates to this defendant, and at the time of the filing of the bill of complaint herein no other or different arrangements were in effect between this defendant and the complainant, or between this defendant and the Mallory Line, save and except that this defendant had made a contract arrangement with the Mallory Line for joint through rates and joint billing such as hereinbefore stated and hereinafter set out, and pursuant thereto this defendant and the Mallory Line filed with the interstate commerce commission such joint through tariff as stated. The defendant further avers that the complainant has substantially at all times since it has been engaged in the trade between New York and Galveston allowed to this defendant its established rail rates to and from Galveston on such traffic; and further avers that the defendant has not and does not intend to deny the right to the complainant hereafter of having its commerce carried to and from Galveston at the defendant's regularly established Galveston rates. And defendant further alleges that its regularly established rates heretofore, now, and hereafter to be in effect to and from Galveston have been, are, and will be reasonable, just, and lawful.

"The contract agreement between this defendant and the Mallory Line includes a through joint rate between the points established by the joint tariff hereinabove referred to, through bills of lading, and through billing, and, for the present, a division of the through rate on the basis of allowing the defendant and its connecting lines, as their proportion of the through rate, the established tariff rate from Galveston to the southwestern inland point of origin or destination. The defendant, however, alleges that it is and will be entirely lawful for the defendant and the Mallory Line to make any division of the through rate between themselves, as from time to time they may determine to be just and equitable. The reasons which led the defendant to enter into this contract arrangement with the Mallory Line are, among others: (1) The Mallory Line has been long running, and is now running, and is to continue to run, well-equipped steam-

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ships between New York and Galveston, carrying a large commerce, and has a well-established business, and the good will of the shippers of the country, and is competent and reliable, and in every way capable, trustworthy, and responsible. (2) That the arrangement between the defendant and the Mallory Line, whereby they carry upon a joint through rate, published and known to the world, and filed with the interstate commerce commission, can but be beneficial to the public at large, and redound to the mutual advantage and benefit [413] of both parties to the arrangement. (3) The steamships of the Mallory Line engaged and to be engaged in the Galveston and New York business are equal, if not superior, to any steamships in the United States engaged in what is known as the 'Atlantic Coast Service.' (4) The steamships of the Mallory Line are provided with ample facilities for the carriage of both freight and passengers. (5) The Mallory Line is equipped with much better ships than any other line running between Galveston and New York, and makes several days' better time between the two ports than any other ships. (6) The steamships of the Mallory Line plying between Galveston and New York arrive and depart at regular stated times; and in the arrangement which has been made between this defendant and the Mallory Line hereinabove referred to it has been understood and agreed that the necessary number of steamships of the Mallory Line should arrive and depart each week, arriving and leaving upon certain days of the week so far as possible. (7) The Mallory Line afforded the best opportunity and the best facilities for a through business connection with the defendant.

"The defendant further shows that the complainant company has not such a service between New York and Galveston as to make it specially desirable for this defendant to establish a joint through tariff with it, with through bills of lading and through billing. The complainant's steamships are not equal in speed or appliances to those of the Mallory Line. They require eight to ten days to make the trip between Galveston and New York, while the steamships of the Mallory Line make the trip in about six days. The steamships of the complainant are not combined freight and passenger ships, but are built only for freight, though they may be able to carry a few passengers. Since the complainant entered the Galveston and New York trade, its ships have not arrived or departed at regular and stated periods. At first they ran a ship about once a week, but leaving upon no particular day, and for some time past and at present their ships are not running so often, and arrive and depart on no particular day or regular time. This defendant further distinctly avers that it does not intend, by the establishment of the through rate and through billing and through business connections with the Mallory Line, to in any way unduly or unreasonably discriminate against the complainant's line, and states that whatever advantage the Mallory Line may secure over the complainant's line is the result of the contract arrangement between the Mallory Line and the defendant, and that such contract arrangement is reasonable, justifiable, and lawful. The defendant avers that it is, and will be at all times, ready to deliver to or receive from the complainant's line all business which shall be consigned to or from that line, and destined over the line of the defendant or its connections. But the defendant avows the purpose of requiring, so long as it deems proper, the prepayment of freight delivered by the complainant to the defendant, and says that such requirement is and will be no unjust discrimination against complainant, but one that is authorized and justified by law. The defendant states that it is not ready to enter into an arrangement with the complainant for a through joint service such as it has made with the Mallory Line, and submits that it ought not and cannot be

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required to enter into such an arrangement, as under the law the defendant is not bound to carry beyond its own line. The defendant will at all times move with promptness and dispatch to and from complainant all freight which may be tendered at the established rates from Galveston, and accord to the complainant every right which it accords to every other shipper tendering it freight at Galveston. The defendant further shows that the complainant, by the bill, seeks to avail itself of the benefits of a contract arrangement entered into between this defendant and the Mallory Line, which it has no right to do. The defendant shows that the complainant is not subject to the interstate commerce laws, and has not moved, and does not move, its commerce under any tariff filed with the interstate commerce commission; and, not being subjected to the burdens and penalties of the interstate commerce laws, cannot, in this proceeding, avail itself of the benefits thereof by securing the advantage of a joint through rate, which, under the interstate commerce laws, can only be made by the joint assent of the parties. The defendant further shows that the complainant has moved the freight which it carried between Galveston and New York at rates not published, and varying from time to time, and that the rates at all times heretofore charged by the complainant since it has been in the business of carrying between Gal- [414] veston and New York have been such that, when added to the established railroad rates from Galveston over defendant's line and connections, would be less than the through rates established by the arrangement hereinbefore referred to which has been made between the defendant and the Mallory Line to and from New York and a large portion of seaboard territory."

The other defendants each separately submitted its demurrer, on the following grounds, and in identically the same words:

"(1) That the said complainant hath not, in and by its said bill, stated such a case as doth or ought to entitle it to any such relief as is hereby sought and prayed for from or against this defendant.
* * * (3) That, if the matters stated do give the complainant any cause of complaint against this defendant, the same is triable and determinable at law, and ought not to be inquired of by this court.
(4) That it appears from the bill of complaint that the relief is sought for under and by virtue of an act of congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' That under the said act the only remedy given to a private party, or any party other than the government of the United States, is that of a suit for threefold damages, costs, and reasonable attorney's fees; and it appears from the said act that the only party entitled to maintain bill for injunction for any alleged breach thereof is the government of the United States, by its district attorney, on the authority of the attorney general. That it further appears that, independently of such statute, the matters set forth in the bill of complaint do not show any cause of action, at law or in equity, as independently of such statute the matters set forth in the said bill do not show any illegal or wrongful combination or conspiracy. And herein this defendant says that it has the legal right to decide what parties it will credit and what parties it will not credit, by refusing to carry freight without prepayment of charges, and has the right to decide what parties it will lend money to by advancing charges and what parties it will refuse to so lend money to. And herein this defendant further says that it is under no legal obli-

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gation to transport or enter into any extra terminal arrangement concerning the transportation of freight except on its own terms; and when it does, of its own volition, enter into such extra terminal arrangements for the through carriage of freight, through billing, through bills of lading, etc., it is entitled to select the connection with which it desires to establish such arrangements, and that it has the perfect right to make such arrangements with one connection without making the same or similar arrangements with others. Defendant further says that the bill fails to allege any facts which show that complainant is entitled to have this defendant compelled by process of the court to enter into traffic relations with it."

On March 2, 1898, the judge of the circuit court passed his decree as follows:

"This cause having been brought on to be heard on the pleadings and affidavits in support of same, and solicitors for both complainant and respondents having been heard, and due deliberation having been had, it is ordered, adjudged, and decreed by the court that the preliminary injunction prayed for in complainant's bill be granted; and the respondents the Gulf, Colorado & Santa Fé Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, and the International & Great Northern Railroad Company, and each of them, their respective agents and servants, are hereby enjoined, until final hearing of this cause, from interfering in any way with the business of the Miami Steamship Company, as it has heretofore and is now being carried on between said railway companies and the Miami Steamship Company, or from discriminating against said Miami Steamship Company in the making and granting of through rates, in the manner and mode of payment of freight and charges, and in the manner of through billing of freight, and from enforcing and carrying into effect the agreement between them and others operating as the South-western Freight Bureau, in so far as the same affects the Miami Steamship Company; and you and each of you, your respective agents and servants, are hereby commanded to afford to the Miami Steamship Company the same facilities with reference to the interchange of freight, to accept from and deliver to it freight [415] under the same conditions and terms, as are by you or either of you granted and extended to any other steamship line operating between New York and Galveston; and you are further commanded to make to Miami Steamship Company the same rate of freight on interstate and through business, and to allow to said Miami Steamship Company the same pro rata or division of such through rates as by you or either of you given to any other steamship line operating between New York and Galveston, and especially to the New York & Texas Steamship Company."

The defendants jointly and severally asked to be allowed to appeal, and have jointly and severally assigned errors as follows:

"(1) The court erred in entertaining the bill for injunction, for the reason that it disclosed no equity on its face. (2) Defendants had and have, and each of them had and has, the right to demand prepayment of freight charges when delivered to them or either of them by a connecting carrier, without exacting such prepayment when delivered by another connecting carrier. (3) The defendants had and have,

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and each of them had and has, the right to advance freight charges to one connecting carrier from which they or either of them may receive freight for further transportation, without obligation to advance freight charges to another connecting carrier. (4) The defendants had and have, and each of them had and has, the right to enter into a contract with one connecting carrier for the through transportation of freight, for through joint rates, for through billing, and for the division of through rates, without being obligated to make the same contract with another connecting carrier. (5) The bill fails to show any such discrimination as falls within the purview of the third section of the act to regulate commerce. [Specifications 6 to 15, inclusive, omitted.] (16) The act to regulate commerce (and the several amendments thereof) provides its own machinery and its own remedies for the enforcement thereof, which remedies were intended to be exclusive, and no right to injunction is thereby given upon the complaint of any private suitor."

The appellants contend that the several arrangements effected between the Mallory Line and the defendant railway companies do not violate the common law, or the interstate commerce law of the United States, or any statute of the state of Texas. They contend that there is no obligation imposed upon the defendant companies to make any arrangement for through joint shipments, with a joint tariff, through billing, and a waiver of prepayment of freight, with the Lone Star Line because of the fact that they have such arrangements with the Mallory Line. They contend that there is no general usage or custom having the force of law or local custom at Galveston, Tex., which gives to one connecting carrier the right to have the same arrangements as to through shipments on joint tariffs which other carriers may have acquired by contract. They contend that the arrangements existing between the Mallory Line and the defendants are several contract arrangements between it and each of the defendants, and that the same are in no way affected by the fact, if it is a fact, that there was an understanding in advance between the defendant railway companies that they would each make a several arrangement with the Mallory Line. The alleged agreement between the steamer lines and the defendants, so far as it provides "that the Mallory Line is to cancel all existing contracts or special arrangements with the Kansas City, Pittsburg & Gulf on Missouri river business, and hereafter abide by rates and regulations fixed by this association," does not appear, on the face of it, or in the allegations of the bill, to give any ground of grievance to the complainant. The complainant

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does not expect to receive any [416] freight from these steamer lines, or desire to furnish any freight to either of them, but, so far as it is related to either, it is a rival of each, competing with each, more or less, for the "Missouri River business." This part of the agreement looks like it would work in the interest of the complainant by throwing to it all of the business of the Kansas City, Pittsburg & Gulf Railroad and any other carriers in the territory from which the complainant solicits traffic who are not members of the Southwestern Freight Bureau. The provision "that all rates less than association basis between Texas points and all territories be withdrawn February 15th" would likewise seem to affect the complainant favorably, whether the complainant's rates are lower or not so low as those authorized by the association basis. If the complainant's rates are lower, this provision would seem to constitute an inducement to traffic to patronize the complainant's line. If its rates are higher, the provision is an abatement of competition to the extent that the association rate is higher than the rate that the other steamship lines have been offering, for it is only "rates less than association basis" that are to be withdrawn. There is then left as the subject of complaint by the appellee the provision "that all through rates and divisions by Gulf ports be discontinued from and to domestic ports with steamer lines not members of this association, and all interchange of traffic with such lines be discontinued as far as possible, and that prepayment of freight be demanded from the steamer lines not members of this association."

It is urged that at common law a common carrier is not bound to carry except on its own line, and, if it contracts to go beyond, it may, in the absence of statutory regulations, determine for itself what agencies it will employ, and its contract is equivalent to an extension of its line for the purpose of the contract. And if it holds itself out as a carrier beyond its line, so that it may be required to carry in that way for all alike, it may nevertheless confine its carrying to the particular route which it chooses to use. It puts itself in no worse position by extending its route with the help of others than it would occupy if the means of transportation employed were all its own. It may select its own agencies

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and its own associates for doing its own work. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 687, 4 Sup. Ct. 185. We listened attentively and with interest to the able oral argument of counsel who appeared for the appellee, and we have diligently examined the printed brief which they submitted, and the numerous authorities cited thereon, but we do not find in all that they have advanced, or in any of the authorities we have examined, anything to weaken the force of the above suggestions and the authority on which the suggestions rest. On a subject so prolific of litigation as the rights, duties, and liabilities of railroad carriers, and the rights of individual consignors and consignees and of connecting carriers doing business with the railway companies, an immense mass of litigation has necessarily arisen, and a large number of adjudged cases from courts of high respectability are reported. Many of these cases are comprehensive in the reach of their authority, and more comprehensive in the compass of their [417] dicta. They distribute themselves more or less through all the questions involved in the case now before us, and are hardly susceptible of close alignment with the questions here, or satisfactory review in connection with these questions. They are instructive in their analogies, but the facts are different from those we have now to consider, and we think it best to let our application of their analogies appear rather in the disposition of the questions on which we are called to pass than in any attempted formulation of their doctrine in language which, quoted out of its logical connection, and construed from the standpoint of new cases hereafter arising, might tend to mislead.

Counsel for the appellee cite sections 2, 8, and 7 of the act to regulate commerce of February 4, 1887; also section 2 of the act of March 2, 1889 (amending section 10), to amend the act to regulate commerce. Section 2 of the act of 1887 clearly defines what shall constitute the unjust discrimination which it prohibits, and cannot be made to apply to this case without assuming that the contract existing between each of the defendants and the Mallory Line for the extension of the business of each over that line does not constitute substantially dissimilar circumstances and conditions under

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which the defendants are doing business with the Mallory Line from the circumstances and conditions under which the Lone Star Line is claiming the right to do business with the defendants. Such an assumption, we think, is repelled by the authorities which support our conclusion as to the defendants' contract arrangements being valid at common law. To support appellee's claim under the third section of the act to regulate commerce, we should have to hold that the defendant carriers could not contract with the Mallory Line for extending their business over that line without at the same time making a similar contract with any other party who is shown to be able and offering to do the same carrying with equal safety, dispatch, and responsibility, and that to decline to let such stranger carrier into their contract, or to make an equivalent contract with it, is to give an undue and unreasonable preference and advantage to the line contracted with and to subject the stranger to an undue and unreasonable prejudice or disadvantage in respect to the traffic it desires to carry. If it should not be so held, the contract arrangements which the defendant carriers have with the Mallory Line do not constitute the facilities for the interchange of traffic, or that discrimination in rates and charges between connecting lines to which the second paragraph of section 3 applies. The last clause of the second paragraph of section 3 provides that that paragraph shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. It is provided in section 6 that every common carrier subject to the provisions of the act shall file with the commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of the act to which the carrier may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such [418] continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with the commission. These provisions do not expressly authorize the separate carriers to contract with reference to

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through routes and joint tariffs because the carriers had that authority. But these provisions do necessarily imply the recognition that that authority did exist, and that it could be exercised after the passage of the act in like manner as it was known to have been exercised for long periods before the passage of the act, and to be in general use at the time of its passage. The act does not expressly authorize the separate carriers to establish rates, fares, and charges on their respective lines, but it recognizes that such carriers have that right, in like manner as it recognizes that two or more connecting carriers have the right to contract for through routing and a joint rate, subject in each case to the leading limitations embraced in the first four sections of the act. The fact that these parties were left free to contract in reference to this subject necessarily includes a freedom to decline to contract in case they cannot agree upon the terms, or in case they consider it to their interest not to contract on any terms. This legislation was had, as all useful legislation is had, in reference to the existing conditions and the manifest tendencies of the subject embraced. It was at that time matter of common knowledge, and minutely within the knowledge of the committees of congress which had this subject in charge, that freight and passengers were being carried through all the states from one extremity of the Union to the other, over continuous lines or routes, operated by more than one carrier, on tariffs of rates and fares and charges regulated as to their amount, the time and place of their receipt, the pro rata division thereof by the respective carriers, the accounting for, paying, and distribution of the same by and to the respective carriers according to their contract agreement or understanding, express or implied. The committees of congress, especially certain members who were most active in promoting this legislation, had knowledge of the English acts on the same subject, and studied profoundly the different clauses, and even the phraseology, of those acts, and their practical application to the business of transportation in England, and the decisions of the commission there established and of the courts in construing those acts. And we are greatly aided in construing our act by observing what provisions of the English act it adopts, what provisions it

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modifies, and how they are modified, and what provisions are omitted. The English act of 1873, amendatory of the act of 1854, authorized the commission by it established to establish through routes, and to fix through rates between connecting lines, and provided that the facilities to be afforded shall include the due and reasonable forwarding and delivering by any railway company and canal company, at the request of any other such company, of through traffic to and from the railway or canal or any other such company, at through rates, tolls, or fares, but required the commissioners, in the apportionment of such through rates, to take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or making of the route, or any part of the route, as well as any special charges which [419] any company may have been entitled to make in respect thereof. This provision is wholly omitted from our act. The interstate commerce commission was early impressed with the view that there were cases in this country where through routes and reduced through rates, which would facilitate the movement of traffic, and thereby benefit the public, are prevented from being made by the unreasonable refusal of carriers to unite in granting such facilities; and, being impressed with the view that the statute was apparently designed to require connecting carriers to join in the formation of through routes at lower aggregate rates than a combination of their locals, have repeatedly called the attention of congress to the fact that it had failed to provide the machinery necessary to accomplish that purpose. As the commission, in one of their latest opinions, say, the correction of this defect requires the exercise of some public authority which can investigate the circumstances of each case, allow the parties to a proposed through rate an opportunity to be heard, and fairly determine the matter—including, if need be, the aggregate rate and divisions thereof—with due regard to the interest of the several carriers as well as the public. Such a scheme for establishing compulsory through rates should be surrounded by proper safeguards, and its operation limited by proper restrictions. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, *supra*; *Interstate Commerce Commission v. Balti-*

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more & O. R. Co., 145 U. S. 262, 12 Sup. Ct. 844; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700; *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 686; *Interstate Commerce Commission v. Alabama M. R. Co.*, 18 Sup. Ct. 45; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 626 et seq.; *Railroad Co. v. Platt* (decided by the Interstate Commerce Commission June 26, 1897).

As we view the complainant's bill and construe sections 2 and 3 of the act to regulate commerce, in connection with the contract or arrangement shown to exist between the defendant carriers and the Mallory Line, section 7 of the act and section 10 as amended have no bearing on the case made. We think it clear from our construction of the text of the interstate commerce act and its amendments, and the reasoning and authority of the few cases just cited, and the numerous other cases in line with them, more or less pertinent to our inquiry, that the case attempted to be made in the appellee's bill of complaint to the circuit court cannot be maintained under the interstate commerce act. The bill shows that for many years prior to July 15, 1897, there had been no competition with the Mallory Line in the transportation of traffic by steam vessels from Galveston to New York; that the complainant's own line began business on the 15th of July, 1897, or seven months, less three days, before the exhibition of its bill. The custom and usage that obtained with reference to this interstate and foreign traffic, if any existed and was observed by the defendant carriers before July 15, 1897, was necessarily restricted to receiving and delivering freight from and to the Mallory Line (as they are continuing to do), and not of delivering or receiving to or from other lines, or to or from all lines, because none other than the Mallory Line theretofore existed. [420] It can hardly be claimed that the usage which has obtained with the complainant's line has acquired the force of local custom. Where a local custom does exist in reference to matters about which parties contract, and they refer expressly to the custom of the port or place, or make no express reference to it, such custom will be considered in construing such contracts. But it is beyond the power of a local custom to compel parties to

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contract, or to impose its terms on their dealings, against their expressed will, or against the duly-expressed will of either of them.

Counsel for appellee also cite articles 4536, 4587, and 4539 of the Revised Statutes of Texas of 1895. It is shown by the bill that all the traffic which the complainant is engaged in handling is interstate or foreign commerce. Such commerce is subject to exclusive regulation by the national government. This power to regulate such commerce is vested in congress, and is not a dormant power, but has been put into full exercise by the act of February 4, 1887. Hence the articles of the Texas statutes cited can have no application to such commerce as that which the complainant is engaged in conducting. There is nothing in the language of the Texas statute that indicates a purpose upon the part of the legislature that the articles quoted should apply to interstate or foreign commerce.

The appellee contends that the defendant railway companies entered into such a combination, conspiracy, and agreement as is prohibited by the act to protect trade and commerce against unlawful monopoly, approved July 2, 1890, for the purpose and with the intention of monopolizing the traffic of interstate commerce between New York and Galveston, in restraint of such commerce, and for the purpose of preventing complainant from carrying on its business of common carrier in such traffic. Counsel cite sections 1, 2, 4, and 7 of the act named. Sections 1 and 2 are strictly penal. So far as section 4 confers any new jurisdiction upon the circuit courts of the United States to prevent and restrain violations of this act, such new jurisdiction, if any is conferred, appears to be limited in its exercise to suits on behalf of the government instituted by the district attorneys of the United States in their respective districts, and under the direction of the attorney general. *Blindell v. Hagan*, 54 Fed. 40; *Hagan v. Blindell*, 13 U. S. App. 354, 6 C. C. A. 86, 56 Fed. 696. Section 7 provides that any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act may sue therefor in any circuit court of the United States in the district in which the

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defendant resides or is to be found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. In the case of *Blindell v. Hagan*, *supra*, it was said by the learned judge of the circuit court that this act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation. But it gives no new right to bring a suit in equity, and a careful study of the act leads to the conclusion that suits in equity or injunction [421] suits by other than the government of the United States are not authorized by it. However, as the citizenship of the parties was such that the United States court had jurisdiction, the learned judge retained the case, and awarded the preliminary injunction prayed for, because the nature of the alleged injury was such that it would be difficult to establish in a suit at law the damage to the plaintiff, and because to entertain it would prevent a multiplicity of suits. In the same case on appeal this court said:

"We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction is maintainable on general principles of equitable jurisdiction, and a careful examination of the case satisfies us that under all the facts before it there was no error in the court awarding a preliminary injunction."

In *U. S. v. Debs*, 64 Fed. 724, the circuit court, to sustain its jurisdiction, relied mainly on the act of July 2, 1890. When the case came in review before the supreme court in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, that court entered into no examination of the act of July 2, 1890, preferring to rest its judgment on the broader ground of the general jurisdiction of a court of equity to prevent injury in such cases. The supreme court was careful to observe that it must not be understood from its putting its judgment on the broader ground that it dissented from the conclusion of the circuit court in reference to the scope of the act. The provisions of the act in question apply to railroads, and render illegal all agreements made by them which are in restraint of trade or commerce. *U. S. v. Association*, 166 U. S. 290, 17 Sup. Ct. 540. We do not doubt the general jurisdiction of the circuit

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court as a court of equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination, or conspiracy in restraint of trade. Does the complainant present a proper case for affording such preventive relief? It asks for a preliminary injunction restraining the respondents from interfering with its business as it has been heretofore and is now being carried on between the respondents and the complainant in manner and means in the bill alleged, and restraining them from discriminating against the complainant in making and granting through rates, and restraining them from carrying out the agreement between them and others in so far as it affects the complainant, commanding them to afford to complainant the same facilities, and accept freight under the same conditions, as by them extended and granted to the other connecting steamship lines, etc. Although the language "restraining them" is used in this prayer, it is manifest from the nature of the case and all the allegations in the bill that the preliminary injunction sought for and obtained by the appellee is wholly mandatory in its nature and effect. The bill does not claim that the complainant has any contract arrangement with the defendant railroad carriers which those carriers are about to breach. It does not charge that the carriers are obstructing the complainant's traffic in any particular by violence or other affirmative action so as in any way to hinder the prompt, safe, and [422] convenient interchange of traffic between its line and the respondents' lines, or to hinder the prompt dispatch thereof to its respective destination, at the reasonable rates therefor, which the respondents demand and receive from all persons not connected with them by their contract arrangement for through routing, billing, and rating. It therefore is manifest that the circuit court has no power to grant the relief asked, unless it has power to command that the respondents shall contract with the complainant for such through routing, billing, and rating; and, not only so, but shall contract with the complainant therefor on the same terms that they have contracted with the Mallory Line. All the reasons which have prevailed with congress to with-

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hold this power from the interstate commerce commission, and many additional reasons with strongest force, forbid that the numerous circuit courts should, in advance of legislative action, take jurisdiction, and by mandatory injunction compel such through routing, billing, and rating.

We conclude that the several arrangements effected between the Mallory Line and the defendant railway companies are not violative of the common law; that the case attempted to be made in the appellee's bill of complaint in the circuit court cannot be maintained under the interstate commerce act; that the statutes of Texas relied upon do not and cannot apply to interstate commerce; and that the bill does not present such a case as the circuit court has jurisdiction to relieve by mandatory injunction, either under the anti-trust act or under its general jurisdiction as a court of equity. From these conclusions it results that the decree of the circuit court must be reversed. It is therefore ordered that the order of the circuit court granting an injunction pendente lite be, and the same is hereby, reversed, and the injunction dissolved, and this cause is remanded, with instructions to thereafter proceed in accordance with the views expressed in this opinion, and as equity may require.

[439] CARTER-CRUME CO. v. PEURRUNG.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

[86 Fed., 439.]

REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.—If there is any substantial evidence upon which the jury could reasonably have based their verdict, it will not be disturbed on appeal, though there may have been a motion for a verdict or a motion for a new trial which was overruled.*

SAME—CONTRACT IN RESTRAINT OF TRADE—WAIVER OF DEFENSE.—While the court may possibly reverse a judgment involving the enforcement of a contract contravening public policy in the absence of an objection on that ground in the trial court, it will only do so when such illegality appears as matter of law upon the face of the pleadings, the face of the contract, or from the admitted facts.

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CONTRACTS IN RESTRAINT OF TRADE.—A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade.

SAME.—If an independent manufacturer contracts to sell his entire product, without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer cannot be held to have conspired against the freedom of commerce, or to have made a contract in illegal restraint of trade.

APPEAL AND ERROR—JURISDICTION OF FEDERAL COURTS—OBJECTION NOT RAISED BELOW.—The objection that the suit was not brought in the district of the residence of either party does not affect the general jurisdiction of the court, and cannot be raised for the first time on appeal.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Oscar M. Gottschal, for plaintiff in error.

Charles W. Baker, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge.

This is an action at law. The suit was brought upon a written contract made August 14, 1894, between Peurrung Bros. & Co., a firm then engaged in the business of jobbing wooden ware in Cincinnati, Ohio, composed of Joseph P. and Charles J. Peurrung, and the Carter-Crume Company, a corporation of West Virginia. By this contract, for consideration therein recited, which will be hereafter referred to, the Carter-Crume Company became obliged to pay to Peurrung Bros. & Co. \$250 on the 15th of each month for the next ensuing 3 years, 6 months, and 15 days, unless the contract should be sooner terminated under a provision contained therein. The installments which became due prior to September 15, 1895, were duly paid. The suit was for installments thereafter falling due, which had not been paid. The petition alleged that the firm of Peurrung Bros. & Co. had

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been dissolved, and the interest of Charles J. Peurrung in the contract had [440] been assigned to the plaintiff, Joseph P. Peurrung, who therefore sued in his own name, as he might under the law of Ohio. There was a judgment in favor of the plaintiff for the amount due on the first day of the trial term. The errors relied upon to reverse this judgment as presented by the brief and argument of counsel will be considered in the order in which they have been argued.

1. It is said that the evidence did not show that the plaintiff was the sole owner of the claim in suit; that for this reason the court erred in not instructing for the plaintiff in error as requested at the close of the evidence for the defendant in error; and that for the same reason it was error to refuse a new trial at the close of all the evidence. It is only by the strongest stretch of liberality that we can discover that there was a request for a direction at the close of the evidence for the plaintiff below. But that motion was waived by the subsequent introduction of evidence, and was not renewed at the close of all the evidence. *Railway Co. v. Lowry*, 43 U. S. App. 408, 20 C. C. A. 596, and 74 Fed. 463. There was evidence tending to show that Charles J. Peurrung, in a settlement of the partnership affairs with his brother, Joseph P. Peurrung, assigned this contract, and all due or to become due thereunder, to the said Joseph P. Peurrung. The witness to this was Charles J. Peurrung himself. That this assignment occurred before this suit was brought is also fairly made out. The circuit judge instructed the jury that the plaintiff must show, in order to recover, that he was the real owner of this claim; and that, if the assignment was fictitious, or unproven, the case of the plaintiff must fail. It is not for this court to weigh the evidence. That is the province of the jury, and, where there is any substantial evidence upon which a jury could reasonably find, this court will not disturb the verdict, although there may have been a motion for a verdict, or a motion for a new trial, which was overruled. This is too long and well settled to need other authority than *Railway Co. v. Lowry*, cited heretofore.

2. But it is said that the contract in question is one in restraint of trade, and therefore void. This defense is here

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made for the first time. No suggestion as to its illegality is found in the pleadings. No reference thereto occurs in the charge, nor was any exception taken to any instruction given or refused. If it be true that this contract is one which, for reasons of public policy, is void, the defense in the court below would not be waived by failure to plead properly. It was said in *Coppell v. Hall*, reported in 7 Wall. 542, and repeated in *Oscanyan v. Arms Co.*, 103 U. S. 261-268, that:

"In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it [441] destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

But the general rule is that a defense not presented to the court below cannot be considered on writ of error from a superior court. *Edwards v. Elliott*, 21 Wall. 532; *Wilson v. McNamee*, 102 U. S. 572; *Clark v. Fredericks*, 105 U. S. 4; *Drexel v. True*, 20 C. C. A. 265, 74 Fed. 12. Objections going to the jurisdiction are an exception to this rule, because made so by Act March 3, 1875, § 5.

Possibly, it would be the duty of this court to reverse and remand for dismissal a suit brought here on writ of error which appeared to involve the enforcement of an obligation contrary to good morals or in contravention of public policy, although no such objection had been made in the court below. But such action by an appellate court, as a tribunal for the review of the action of trial courts, would not be justifiable unless such illegality should appear as matter of law from the pleadings, the face of the contract in suit, or from the confessed facts of the case; otherwise the right to introduce evidence in rebuttal and of trial by jury, if the suit be one at law, would be cut off. The plaintiff below did not rely upon any contract which was in itself illegal or void as in contravention of public policy. Counsel for plaintiff in

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error say that the Carter-Crume Company were engaged in an illegal effort to suppress competition, and put up prices in the wooden butter-dish trade, and that as one step in this scheme they bought from Peurrung Bros. & Co. their contract with Tower & Matthews. Manifestly, Peurrung Bros. & Co. had been guilty of no conspiracy against the public in contracting for the entire output of the small factory of Tower & Matthews. Neither was it an illegal restraint of trade for the Carter-Crume Company to contract for the same product, if their trade demanded it. The prior contract with Peurrung Bros. & Co. alone stood in the way. They therefore bargained with them to release Tower & Matthews, and to supply them for a definite time with the same ware, at the market price, less a fixed trade discount. At the same time they contracted with Tower & Matthews for the entire product of their factory. These two contracts were concurrent in time, and were subject to be determined on same notice. There were some features about this last contract which indicate an intention to close the Tower & Matthews factory after the delivery of a certain quantity of ware for the term of the lease, if circumstances should make it desirable. William E. Crume, of the Carter-Crume Company, in the effort to make out a defense of misrepresentation as to the extent of the trade of Peurrung Bros. & Co. in such goods as one inducement to the contract, did say that his company were, by the contracts with Peurrung Bros. & Co. and Tower & Matthews, endeavoring to hold up the prices of such goods, and that Peurrung Bros. & Co. had been selling such ware at a less price than the Carter-Crume Company. The same witness also said that they at that time had other such contracts,—whether with factories or dealers he did not say. There is no evidence that Peurrung Bros. [442] & Co. were aware of any others contracts, or of the purpose of the Carter-Crume Company to control prices, or that they had any purpose of aiding and abetting that company in any such scheme. They did know of the contract with Tower & Matthews. But that of itself was not a contract in general restraint of trade. If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from selling to others. But

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such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with Peurrung Bros. & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Company understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices. The principle, if we admit that the purpose of the Carter-Crume Company was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual. *Roundtree v. Smith*, 108 U. S. 269, 2 Sup. Ct. 630; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950. This defense, not being one which appears either upon the face of the contract in suit or from the admitted purposes of both parties, cannot be urged as an objection here, the objection not having been made in the court below.

3. The next and last ground urged for a reversal is that this suit was not brought in the district of the residence of either the plaintiff or the defendant. This objection was fatal to the jurisdiction if it had been taken in time. The plaintiff was a citizen of Indiana, and the defendant a corporation of West Virginia. Diversity of citizenship, therefore, existed, and the case was one of which the court could take jurisdiction. The act of congress which prescribes the particular district in which a defendant may be sued is not one affecting the general jurisdiction of the court. The exemption from being sued out of the district of the domicile of either of the parties was a privilege which the Carter-Crume Company could and did waive by pleading to the

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merits. *Railway Co. v. McBride*, 141 U. S. 127, 130, 132, 11 Sup. Ct. 982; *Railroad Co. v. Cox*, 145 U. S. 593, 603, 12 Sup. Ct. 905; *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286. The judgment is accordingly affirmed.

[671] THE CHARLES E. WISWALL

THE CHARLES E. WISWALL v. SCOTT ET AL.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

[86 Fed., 671.]

MONOPOLIES—INTERSTATE COMMERCE.—A combination or trust between the owners of tugs operating entirely within the confines of a state is not a combination in restraint of trade or commerce among the several states or with foreign nations, so as to come within the condemnation of the statutes of the United States, although most of the owners held coasting licenses.*

SAME—TOWAGE CHARGES.—One who requests and accepts the services of a tug for towage purposes cannot escape paying the reasonable value of the services rendered, on the ground that the owners of the tugs were members of an unlawful combination to raise prices. 74 Fed. 802, affirmed. [See p. 608.]

This cause comes here upon appeal from a decree of the district court, Northern district of New York, in favor of the libelants, twelve in number, who were severally owners of fourteen propellers or steam tugs which had rendered towage service to the dredge and her scows.

The suit was originally begun by the present libelants, and by eight others, who owned, respectively, nine additional steam tugs or propellers; but, it appearing that no services had been rendered by these last-mentioned nine vessels, the libel was amended accordingly, at final hearing. The court found that the remaining libelants were entitled to recover the value of the services rendered by their respective tugs, and referred it to a commissioner to ascertain, determine, and report the values of the services of the respective vessels over and above all payments on account thereof which may be established by the evidence; such values and the amounts of such payments to be determined upon the evidence already taken, and such additional evidence as may be produced and given by the respective parties before such commissioner. Abundant opportunity was given to all parties by the commissioner to take additional evidence, but none was offered. The commissioner thereafter reported the value of the services of the vessels over and above

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all payments, separately as to each vessel. He did not separately state the value of the services of each tug, and the amount of the payment thereon, but, inasmuch as it appears conclusively that \$310 was paid, it would seem that he found the total value of the services to be \$1,269.16. The value asserted in the amended libel was \$1,300. Claimant filed exceptions to the report, and, the report and exceptions coming on to be heard, the decree now appealed from was entered.

Worthington Frothingham, for appellant.

Isaac Lawson, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts).

The record is long and somewhat involved, and the commissioner's report has not set forth his findings with sufficient detail to be of much assistance to the court in determining just what he did find and upon what proof. This appeal may be best disposed of by taking up the assignments of error seriatim.

1. It is assigned as error that the libelants in the original libel and in the amended libel were a combination in the form a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states and with foreign nations; that libelants were engaged in an attempt to monopolize such trade or commerce; and that all the work alleged to have been done by them collectively or individually was under a contract or combination in such form, and that such contract or combination was void, and the libelants cannot maintain this suit either collectively or individually. We do not find any satisfactory evidence that these boats were "engaged in trade or commerce among the several states or with foreign nations." Most of them held coasting licenses, but there is not a scintilla of evidence to show that they ever did anything except to tow canal boats, barges, and such craft on the waters of the Hudson River above Poughkeepsie, and entirely within the limits of the state of New York. And it seems wholly unnecessary to inquire whether their owners had entered into any unlawful combination under the laws of the state. Finding that the rates of compensation for the services of themselves, their crews and their tugs, were becoming so low as to be unremunerative, uncertain,

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and irregular, they agreed with each other to charge for all services rendered by each vessel such sums as might be fixed by a tariff which they adopted. They called themselves the "Hudson River Tug-Boat Association," had a so-called superintendent to allot work among them, adopted a system of fines, etc., but they never became a legal entity either as a corporation, a joint-stock association, or a partnership. They made collectively no contract with the claimant, nor were they capable of making such contract. Each piece of towage service rendered was a transaction between the boat towing and the boat towed, with which the other boat owners in the association had nothing to do. Indeed, the libel (original and amended) is obnoxious to the objection of an improper joinder of libelants. Each should have brought a separate libel; [678] but since this objection was apparently not taken below, and the only result would be to increase the costs to be paid by the defeated party, it need not now be considered. The contracts upon which recovery was had were not with the so-called combination, but severally, with the several tugs rendering the service; the amount of compensation asked and found is the fair and reasonable value of such service; and the existence of the "combination" is no bar to its recovery. The defendant's proposition is that a person who has given work, labor, and services to another, upon that other's employment, may not recover their fair and reasonable value if, during the time that he rendered such services, he had been engaged with other men in like employment with himself in a combination to charge for such services as any of them might render according to some scale agreed upon by them. We know of no principle of law which calls for the adoption of such a rule, and are referred to no authorities which support it. The cases cited on appellant's brief are not applicable. The only contract considered in *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, was the contract between the members of the combination. The action in *Bank v. Owens*, 2 Pet. 538, was brought on the usurious note by the bank that exacted the usury; and the same is true of *Bank v. Lamb*, 26 Barb. 596. In *Leonard v. Poole*, 114 N. Y. 377, 21 N. E. 707, the court refused to take an accounting between two parties to an illegal trans-

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action. In *Association v. Houck* (Tex. Sup.) 30 S. W. 869, it appeared that defendants Houck and Dieter had entered into an unlawful combination with other dealers in beer, which secured control of the trade. Plaintiff, by contract with defendants, bound itself to sell to the latter, and to no other dealer in the city of El Paso,—a contract which gave the combination a monopoly of the sale in the city of El Paso of the product of plaintiff's brewery, and materially assisted the parties to the illegal contract in carrying out their object of controlling the market for the sale of beer in that city. The court held that if the plaintiff, when it made its contract with Houck and Dieter, knew of the existence of the combination, it was not an innocent seller, and could not recover, since its contract "is calculated materially to aid the purchasers in effecting their unlawful design." In *Peck v. Burr*, 10 N. Y. 294, it was held that, where a contract is void because of its illegality, there can be no recovery for services rendered under it upon a quantum meruit. But there is nothing illegal about the several contracts sued upon here, which are to render towage services in consideration of the payment of the reasonable value of such services. In *Arnot v. Coal Co.*, 68 N. Y. 558, it was held that "the agreement of the B. C. Co. (of which plaintiff was an assignee) not to sell to others, it knowing that the object of defendant was to create a monopoly, and that this was one of the means of averting competition, made it a party to the illegal scheme of defendant." This is very far from supporting the proposition that had the Pittston & Elmira Coal Company sold 1,000 tons of the coal thus purchased to a local dealer in New York City, at fair market rates, it could not recover. [674] On the other hand, the principle is well recognized by the authorities that a promise remotely connected with an illegal act, and founded on a new consideration, is not tainted with the illegality, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. One illustration given in *Armstrong v. Toler*, 11 Wheat. 258, is this:

"The man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods.

* * * But, after the act is accomplished, no new contract ought to

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be affected by it. It ought not to vitiate the contract of the retail merchant who buys these goods from the importer."

The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If he cannot open his case, without showing that he has broken the law, a court will not assist him. But if he does not claim through the medium of the illegal transaction, but upon a new contract bottomed on independent consideration, he may recover. *Swan v. Scott*, 11 Serg. & R. 155; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. 236. In the case at bar libelants clearly did not require the aid of the alleged illegal transaction to establish their case.

2. It is further assigned as error that "there was on the trial no sufficient proofs of the value of the services alleged to have been performed by the libelants or either of them, and no proof excepting of such value as was made and established by the libelants themselves while engaged in such combination," etc. The record shows that as to each item of charge there was evidence that the service rendered was worth the price charged, and, as much of the work done by the different scows was similar in character and quantity, many of the items of charge are supported by the evidence of several witnesses. The witnesses stated that, in testifying to the value of the services, they did not give consideration to the schedule of prices adopted by the association. The mere fact that in some instances the sum testified to as the fair and reasonable value of a particular service and the price for such service named in the schedule were identical is not controlling. It is not inconceivable that men may combine together to ask a perfectly fair price for their work. Co-operation does not necessarily imply extortion. We have not seen nor heard the witnesses, but the commissioner, who had that opportunity, reached the conclusion that their estimate of value was more nearly correct than that of the single witness called by claimant. As the record discloses evidence to support his finding upon this disputed question of fact, the decree should not be reversed on the ground assigned. Appellant's brief refers to an instance where the tug Andrews charged

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five dollars for towing the dredge from Troy to West Troy, when the regular charge was two dollars, the additional three dollars being charged for the reason that Wiswall (the owner of the dredge) had previously towed with a boat outside of the association. There [675] is no persuasiveness, however, to any such evidence, in view of the fact that the owner of the Andrews is not included among the libelants; that no claim on behalf of that tug is made; and that whatever charges are made, testified to, and allowed for towing from Troy to West Troy and vice versa are at the rate of two dollars only.

3. It is further assigned as error that judgment was rendered against the sureties for this claimant in the original libel wherein the Hudson River Tug-Boat Association was libelant, and that such sureties were discharged by the proceeding allowing the libel to be amended and the libelants to proceed therein individually. It appears, however, that the Hudson River Tug-Boat Association was not the libelant in the original libel. Twenty different persons were individually libelants, of whom eight have been removed by amendment, having no claims. In other words, the suit began with twenty individual libelants, and ended with twelve of them, the obligation of the sureties being to answer the decree of the court. The assignment of error is unsound.

4. The last assignment of error (the sixth) is the general one that judgment should have been given for claimants instead of for libelants. It has been disposed of with the other assignments.

The decree of the district court is affirmed, with interest and costs.

[825] DENNEHY ET AL. v. McNULTA.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1898.)

[86 Fed., 825.]

CONTRACTS—ILLEGAL CONDITION AS CONSIDERATION—EFFECT OF NON-PERFORMANCE.—Rebate vouchers issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, cannot

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be enforced, either at law or in equity, where the condition has not been performed, though such condition be illegal, as in restraint of trade; there being no other consideration for the promise. 23 C. C. A. 415, 77 Fed. 700, affirmed.*

MONOPOLIES—ILLEGAL COMBINATION TO CONTROL BUSINESS—LEGALITY OF CONTRACTS.—One purchasing liquors from an illegal combination of distillers, which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily, and cannot retain the goods, and recover the price paid, or any part of it, either on the ground that the combination was illegal, or the price excessive. 23 C. C. A. 415, 77 Fed. 700, affirmed.^b

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellants filed claims for allowance against the funds in court in the consolidated causes against the Distilling & Cattle-Feeding Company, of which sufficient description appears in the case of *Distilling Co. v. McNulta* (decided by this court Jan. 4, 1897) 46 U. S. App. 578, 23 C. C. A. 415, and 77 Fed. 700.

[1896] (1) The claims of Dennehy & Co. were presented by petition in their name, and consisted of 91 written instruments, called rebate certificates or vouchers, issued by the Distilling & Cattle-Feeding Company to Charles Dennehy & Co., aggregating the sum of \$5,238.23. The instruments are of various dates, numbers, and amounts, and in form as follows, with appropriate insertions in the blank spaces, respectively:

"Peoria, Ill., ———, 189—. No. ———

"Subject to the conditions named herein, and for the purpose of securing the continuous patronage of the within-named purchaser, the successors and assigns of the same, for its products, the ——— Distilling & Cattle-Feeding Co., six months from the date of this purchase voucher, will pay to Charles Dennehy & Co., of Chicago, purchaser, ——— dollars (\$———), being a rebate of seven cents per proof gallon on ——— proof gallons of the Distilling and Cattle-Feeding Company's product purchased this day. This voucher will be valid and payable only upon condition that the above-named purchaser, the successors and assigns of the same, from the date of this voucher to the time of its payment, shall have bought their supply of such kinds of goods as are produced by the Distilling and Cattle-Feeding Company, and all compounds thereof, exclusively of one or more of the dealers named on the back thereof, until further notified, and shall also have subscribed to the certificate on the back hereof.

"Distilling and Cattle-Feeding Co.,

"By J. B. Greenhut, President.

"Not transferable nor negotiable.

"When due, forward to the German-American National Bank of Peoria, Ill., where this voucher is payable without exchange or other charge."

* Decision in 77 Fed., 900, not reprinted. Nothing in it relating to anti-trust law, restraint of trade, or illegal combination.

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Printed upon the back is the following indorsement: "It is hereby certified that from the date of this voucher to the maturity thereof the within-named purchaser, and the successors and assigns of the same, have purchased all of their supply of such kind of goods, and their compounds, as are produced by the Distilling and Cattle-Feeding Co., exclusively from one or more of the dealers named hereon." Appended thereto is a list of 61 dealers or distillers referred to, variously located throughout the United States.

(2) The petition of Moses Salomon sets up that he is the assignee of sundry judgments rendered in justices' courts against the Distilling & Cattle-Feeding Company, and also the holder of vouchers on which said judgments were rendered; but it appeared, and was undisputed, that appeals from the judgments were perfected and pending, whereby the judgments became ineffective; and thereupon the petitioner introduced 47 certificates or vouchers issued to Stein Bros., of various dates, numbers, and amounts, aggregating the sum of \$3,604.64, and similar in form and tenor to the instrument above described, except that in a portion thereof the rebate was named at "five cents per proof gallon," instead of seven cents, as recited in the sample form, and the words, "Not transferable nor negotiable," do not appear, from the record, to have been printed or stamped thereon.

It is not claimed that the payees or holders in either case complied in any respect with the conditions named in the voucher. On the contrary, it appears, and is conceded, that there was neither compliance nor attempt to perform the condition. It further appears that no interest is in fact asserted by either of the payees named in the vouchers; but that (1) the Dennehy & Co. vouchers were indorsed in blank, without recourse, by that corporation, delivered to the United States Distilling Company, and were subsequently delivered to one G. E. Jones, for whose benefit, as finally divulged, the claim was filed in the name of the original payees; and (2) that the vouchers issued to Stein Bros. were by them indorsed payable to the order of one Joseph Wolf, without recourse, and by the latter indorsed in blank, and delivered to the petitioner, Salomon, an attorney at law, under an arrangement that Salomon should bear all expenses, and receive one-half of any amount realized.

The hearing upon the claims was before a special master, who reported to the circuit court "the testimony and evidence, with his conclusions thereon." Aside from the matters above recited, voluminous testimony was introduced on behalf of the claimants, directed to showing that the Distilling & Cattle-Feeding Company, as organized and conducted, was a combination of a large percentage [837] of the distillers of the country,—asserted to be 85 per cent. thereof,—constituting an illegal trust, monopolizing and controlling the product of the country in that line to the extent of nearly 90 per cent; that the system of rebate vouchers in evidence was entered into and designed to carry out and secure the purposes of the monopoly; that, through this control of the major share of distillery products, it was deemed a business necessity on the part of Dennehy & Co., Stein Bros., and other dealers throughout the country, to make all their purchases in that line from the distributors of the combination; or, as stated in the argument of their counsel, it became "impracticable and detrimental to their trade to buy liquors elsewhere," in the face of the monopoly; but it also appears that an independent and accessible supply existed in fact. The conclusions of the special master were against the allowance of the claims in both cases. Exceptions filed by each claimant were subsequently heard and overruled in the circuit court, the report of the special master in each case was confirmed, and final decree entered accordingly. The opinion thereon, by Showalter, Circuit Judge, is reported in 77 Fed. 265.

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Moses Salomon, for appellants.

Levy Mayer, for appellees.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after stating the case as above, delivered the opinion of the court.

Passing technical objections to consider this controversy upon the merits, it is manifest that no liability is chargeable against the Distilling & Cattle-Feeding Company, except upon one or the other of the following propositions: (1) That the conditions contained in the vouchers may either be ignored or set aside for illegality, and the promise thus segregated may be enforced without performance of the conditions; or (2) that in the original transactions money was paid to this corporation under circumstances from which the law raises an implied promise of repayment, within the doctrine of money had and received, which, *ex æquo et bono*, belongs to the party by whom it was so paid. Under either head, the mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal,—a status apparently held in *Distilling & Cattle-Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188,—cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 355, 56 N. W. 864.

1. Can a cause of action be predicated upon the written agreement? In substance, the instrument promises that, "subject to the conditions named," and "for the purpose of securing the continuous patronage" of the purchaser as payee thereof, the Distilling & Cattle-Feeding Company will, in six months after date, pay to the purchaser the amount named, "being a rebate of seven [or five] cents per proof gallon" on a purchase that day made, and to be "valid and payable only on condition" that the purchaser named, his successors and assigns, from date of the voucher to the time of payment, "shall have bought their supply of such

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goods as are produced" by the promisor corporation "exclusively from one or more of the dealers named on the back," and "shall also have subscribed to the certificate on the back." The terms are unequivocal that the promise was not to bind the corporation unless the promisee performed the acts stated. In other words, the obligations of the contract are dependent upon a condition precedent; and there can be no default by the promisor without performance of the condition, unless waived or excused by acts or conduct on the part of the promisor. Under the contract in question, compliance with the conditions was neither obstructed on the one side, nor attempted on the other, and it is manifest that no right of action at law has accrued in favor of the promisees. In view of this status, the appellants contend that the claims are entitled to equitable consideration, because (1) they are presented in the course of a proceeding in equity; and (2) this condition is affixed to the contract as a means by which to carry out the illegal purposes of a monopoly operating in restraint of trade, and for that reason a court of equity should either disregard the condition, or strike it out. But assuming, for the argument, that both premises are well taken, no relief can then be granted for enforcement of the contract, as no consideration is left to support the promise. The condition is the sole consideration for the promise, and, if that is illegal, the promise falls with it. Even if the consideration were invalid only in part, the same result would follow, the promise being indivisible. Bish. Cont. §§ 74, 487; 3 Am. & Eng. Enc. Law, 886; Greenh. Pub. Pol. rule 24. No element of the contract as actually made between the parties remains to be enforced. A court of equity cannot make a new contract for them, nor can it destroy the substance of the one which they have entered into, and at the same time preserve the contract obligation. Recovery upon the vouchers in question, with the conditions unfulfilled, would have that effect, and must be denied in equity as well as in law. *Klein v. Insurance Co.*, 104 U. S. 88, 91.

2. The second and final proposition calls for the application of the equitable doctrine on which assumpsit may be maintained as for money had and received, and the right to this remedy must be found in the original transactions and

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circumstances under which the payments were made to the Distilling & Cattle-Feeding Company. These were, on their face, simple contracts of bargain and sale, and the only payments referred to were made upon distinct purchases of supplies at stipulated prices. These goods were legitimate subjects of trade, and there was no illegality in the nature of the contract of purchase. There is no pretense that the purchaser was either deceived or mistaken. On the contrary, his purchase, so far as appears, was in exact compliance both with his expectations and his bargain. It is not asserted that fraud entered directly into any of these transactions; nor is there impeachment for any cause, except upon the hypothesis for which the appellants contend, by way of collateral attack namely: (1) That an unlawful combination enabled the seller to control and arbitrarily fix prices upon nine-tenths of the distillery products of the country; (2) that the exigencies of business on the part of the purchasers constrained them to deal with this combination; (3) that the amount named in the vouchers as rebate was beyond the fair price, and a distinct addition to the price which was imposed and withheld to secure continuance of the trade. And upon the line of testimony introduced as tending in some measure to show this state [829] of facts the appellants rest their right to recover the alleged excess in the prices paid, as money paid under constraint or duress. Without considering whether the testimony referred to was either admissible under the issues, or of the effect alleged, and conceding, for the purposes of the case, the truth of each of the above propositions of fact, there can be no recovery of the money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory. *Radich v. Hutchins*, 95 U. S. 210, 213; *Loneragan v. Buford*, 148 U. S. 581, 590, 13 Sup. Ct. 684; 6 Am. & Eng. Enc. Law, 57, tit. "Duress," and cases cited. In *Radich v. Hutchins*, *supra*, it is said:

"To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authori-

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ties is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' *Mayor, etc., v. Lefferman*, 4 Gill, 425; *Brumagim v. Tillinghast*, 18 Cal. 265; *Mays v. Cincinnati*, 1 Ohio St. 268."

In the case at bar neither the persons nor the property of the purchasers were within the physical control of the sellers when the contracts of purchase were entered into, or when the payments were made thereupon, and in the eye of the law the transactions were voluntary. At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed. *Emery v. City of Lowell*, 127 Mass. 138, 140; *Custin v. City of Viroqua*, 67 Wis. 314, 320, 30 N. W. 515, and cases cited; 6 Am. & Eng. Enc. Law, 71. As the purchaser elected to take the goods upon the terms fixed, and with all the circumstances in mind, his rights must be measured by the contract, and not by the motives which influenced either party to enter into it. If the seller took advantage of his necessities, and made the price excessive, it would be subversive of the well-established rules which govern contract rights to receive testimony of such circumstances, to so modify the terms agreed upon, and allow recovery of the excess in price. In the case of an injurious combination of the nature asserted here, the remedy is by well-recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal, or that its prices were unreasonable. We are of opinion that no foundation is established for either set of claims, and the decree thereupon is affirmed.

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[659] SOUTHERN INDIANA EXP. CO. v. UNITED STATES EXP. CO. ET AL.*

(Circuit Court, D. Indiana. August 4, 1898.)

[88 Fed., 659.]

CARRIERS OF GOODS—DUTIES OF CONNECTING LINES INTER SE.—The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, nor to advance the charges of a connecting carrier from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another.^b

[660] SAME—EXPRESS COMPANIES—INTERSTATE COMMERCE ACT.—The interstate commerce act does not apply to independent express companies not operating railway lines.

MONOPOLIES—ANTI-TRUST LAW—REMEDIES.—The anti-trust law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, his remedy being by an action at law for damages.

CARRIERS—EXPRESS COMPANIES—INDIANA STATUTE.—The statute of Indiana prescribing the duties of railroads with reference to intersecting lines (2 Burns' Rev. St. 1894, § 5153; Rev. St. 1881, § 3903) has no application to express companies.

SAME—CUSTOM—SUFFICIENCY OF ALLEGATION.—In a bill against three express companies, an allegation of a custom between defendants to receive goods from each other for transportation without prepayment of charges, and to advance back charges to each other, is not an allegation of a general custom of the business, which would bind defendants to pursue the same method with other companies.

This was a bill by the Southern Indiana Express Company against the United States Express Company and others. Heard on demurrer to bill.

Joseph H. Shea and Francis M. Trissall, for complainant.

Baker & Daniels, for defendants.

BAKER, District Judge.

This bill is filed by the Southern Indiana Express Company, a corporation organized and existing under the laws

* Affirmed by Circuit Court of Appeals, Seventh Circuit (92 Fed., 1022). Memorandum decision. See p. 993.

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of the state of Indiana, against the United States Express Company, the American Express Company, the Adams Express Company, and certain individual defendants, alleged to be officers and stockholders in said companies. The express companies are alleged to be joint-stock associations organized under the law of the state of New York, which is as follows:

"Any joint-stock company or association consisting of seven or more shareholders or persons may sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association; and all suits and proceedings so prosecuted by or against such joint-stock company or association, and the service of all process or papers in such suits and proceedings on the president or treasurer, for the time being, of such joint-stock company or association, shall have the same force and effect as regards the joint rights, property and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders and associates in the manner now provided by law."

The bill alleges that the defendant companies have been for many years engaged in the express business, and in carrying articles of trade and commerce over railroads under contracts with them, and have been declared by the law of this and other states to be common carriers, subject to all the liabilities, and bound to perform all the duties, of such common carriers; that the complainant entered into a contract with the Southern Indiana Railway Company, a railway located wholly within this state, to carry on an express business over said railway for five years from and after June 30, 1898; that the defendant companies carry on an express business over railroads which connect with the Southern Indiana Railway, and that the express business originating on the line of railway over which the complainant carries on its business cannot be transported to its destination without passing over one or more of the lines of railway over which some one of the defendant companies carries on its business; that the usage, long established, over the Southern Indiana Railway by the defendants, as well as long, continuously, universally, and uninterruptedly established by them over the lines of railway on which they carry on their business, was to receive and deliver to each other packages for points beyond their own routes, so that a package for a distant point is transferred from one express company to another as often as required to reach its destination, and is taken by one

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continuous and unbroken carriage, and, to facilitate promptness and simplicity in transfers from one company to another, the receiving company pays to the tendering company all charges which have accrued for carriage to the point of tender, known as "accrued charges" or "advance charges," so that the company having advanced all the accrued charges receives from the consignee and retains the whole amount of charges to the point of destination; that another of such established customs and usages is to receive and forward packages from each others' lines to consignees at points of destination over the lines of the others without requiring the prepayment of charges from the consignor or the company to which the package is delivered to be forwarded; that another of the customs and usages established is the fixing and publication of tariff charges for carrying packages from and to all points, which tariffs are divided pro rata between each of the companies handling the package. The bill then proceeds to aver that these usages and methods of doing business were safe, reasonable, and essential to the quick and simple transfer of packages, and to the transaction of the express business, and that any company denied the facilities thus afforded would be unable to compete in the same business with another company which could avail itself of such usages, and could not do a general express business so as adequately to accomodate the public. The bill then proceeds to allege that the defendant companies refuse, when articles of trade and commerce carried by the complain[an]t are tendered to the defendants, to pay the accrued charges, or to receive and transport to their destination any such articles without the prepayment of the charges for such transfers. The prayer of the bill is that the defendants may be enjoined and restrained from refusing to receive any and all parcels offered or delivered to them by complainant for transportation and delivery to consignees, and from demanding prepayment of their charges for such transportation, and from retaining and withholding from the complainant all sums of money known as accrued charges for express matter delivered to them by the complainant, and from refusing to or retaining from the complainant the reasonable pro rata part of the

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charges and compensation complainant may earn upon express business originating off its line.

The grounds upon which these claims for injunctive relief are predicated are: (1) That such is the duty of common carriers at common law; (2) that such is their duty under the interstate commerce act; (3) that such is the requirement of the anti-trust law; (4) that such duty is imposed upon them by the custom and usage set up in the bill.

The defendant companies have demurred to the bill and the amendment thereto, on the ground that the court is without jurisdiction, [662] and also because the bill and the amendment are without equity, on the facts stated.

Waiving, without deciding, the question of jurisdiction, the court is of opinion that the bill cannot be maintained on any one of the above-stated grounds.

1. There is no principle of the common law requiring a common carrier receiving articles of trade and commerce from a connecting line to advance or assume the payment of the charges accrued thereon for the transportation of such articles from the point of origin to the connecting line. If it does thus pay or assume such accrued charges, it can retain a lien upon the property transported for their payment as well as for the payment of the charges due to itself for such transportation. An express company, like any other common carrier, has a right to demand that its charges for transportation shall be paid in advance, and is under no obligation to receive goods for transportation unless such charges are paid if demanded. Nor is such express company under any obligation to pay to the tendering company the charges due to it for its services in transporting such articles of trade and commerce from the point of origin to the point of tender. It is true that the general practice is to collect the charges upon delivery of the goods to the consignee, and, when goods are received without payment in advance being demanded, it becomes the duty of the carrier to transport them to their destination, or to deliver them to the next receiving carrier. Receiving the goods for transportation without any demand for prepayment of charges constitutes a waiver of such right. The carrier holds a lien upon the

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goods for payment of charges, and, in case of a delivery of them to the consignee before payment, it can hold him responsible therefor. The same rule applies whether the articles of trade and commerce are received from the original consignor or from a connecting carrier. An express company, in the absence of contract, is under no obligation to receive and transport for the original consignor, or to continue the transportation for a connecting carrier, without the prepayment of its charges if demanded. The furnishing of equal facilities, without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers because it extends credit for such services to others. *Oregon Short-Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 9 C. C. A. 409, 61 Fed. 158; *Id.*, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559.

2. The interstate commerce act has, so far as express companies not operating railway lines are concerned, wrought no change of the common law in this regard. At an early day the question was raised whether express companies were subject to the provisions of the interstate commerce act, and, after full argument and deliberate consideration, the interstate commerce commission unanimously decided that the act did not apply to express companies properly so termed; that is to say, to independent organizations that carried on an express or parcel business in the usual manner, and which did not operate railway lines. *In re Express Companies*, 1 Interst. Commerce Com. R. 349. [663] This case was decided on December 28, 1887. The commission shortly thereafter called the attention of congress to their ruling, and suggested such an amendment of the law as would place express companies within their jurisdiction; but, although more than 10 years have elapsed, congress has taken no action on the subject. The same conclusion was reached in *U. S. v. Morsman*, 42 Fed. 448. After a careful consideration of the question, I see no reason to doubt the correctness of the

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conclusions reached in these cases. Under the averments of the bill, it is manifest that neither of the express companies is affected by the interstate commerce act.

3. The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees, and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States by its district attorney, on the authorization of the attorney general. *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407, and cases there cited.

Nor does section, 5153, 2 Burns' Rev. St. 1894 (section 3903, Rev. St. 1881), aid the complainant's contention. The sixth paragraph of that section is as follows:

"Every such corporation shall possess the general powers and be subject to the liabilities and restrictions expressed in the special powers following: * * * To cross, intersect, join and unite its railroad with any other railroad before constructed at any other point on its route and upon the grounds of such other railway company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections and grant the facilities aforesaid."

This paragraph plainly is not applicable to express companies which, like these defendants, do not own, control, or operate a railroad line, but which simply contract for space on railroad trains for the transportation of articles of trade and commerce committed to their care. Besides, the connections and facilities referred to are manifestly the physical connections essential to constitute the two railroads connecting lines. Such is the view of the supreme court of this state. *Lake Shore & M. S. Ry. Co. v. Cincinnati, W. & M. Ry. Co.*, 116 Ind. 578, 19 N. E. 440; *Chicago, St. L. & P. R. Co. v. Cincinnati, W. & M. Ry. Co.*, 126 Ind. 513, 26 N. E. 204. The same view of a very similar provision of the constitution of Colorado was taken by the supreme court of

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the United States in *Atchison, T. & S. F. Ry. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185.

4. There is not shown by the averments of the bill and the amendment to be any such custom or usage as would justify the court in granting the relief prayed for. The right of the complainant to such relief depends upon its showing the existence of a custom or usage having the force of law in the express business of the country. It is not enough to allege and prove a custom or usage among one or more express companies to pay accrued charges by the receiving company, [664] or to transport without prepayment of charges to the point of destination. Before a custom or usage can acquire the force of law, it must appear that it is general and uniform in the business to be affected by it, and that such custom or usage has been peaceably acquiesced in without dispute for a long period of time. The custom or usage set out in the bill is not shown to be of this character. It is certainly beyond the power of the defendants, by any custom or usage established between themselves, to compel all other express companies in this country to submit to the customs and usages which they have adopted. Nor because the defendants consent to pay accrued charges between themselves, and to continue the carriage of articles of trade and commerce to their destination without prepayment, can they be required to do the same for all others. While the method of doing business alleged to exist between the three defendant express companies is certainly highly advantageous to the prompt and speedy transportation of parcels and packages, the law cannot compel them to continue this method of doing business, even between themselves, much less as between themselves and others with whom heretofore they have had no business relations. Whether such a duty can be imposed by legislative enactment we need not consider, for no such exercise of power has as yet been attempted.

In the opinion of the court, the demurrer must be sustained, and, as no amendment can make a better case, the bill and the amendment will be dismissed, at complainant's costs.

Syllabus.

[1020] UNITED STATES v. JOINT TRAFFIC ASS'N.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.) No. 92.

[89 Fed., 1020.]

Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Charles Howland Russell, Allen McCulloh, Ashbel Green, Frank Loomis, and Carter & Ledyard, for appellee. No opinion. Affirmed. See 76 Fed. 895 [(p. 615), also 171 U. S. 505].

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[505] UNITED STATES v. JOINT TRAFFIC ASSOCIATION.*

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 84. Argued February 24, 25, 1898.—Decided October 24, 1898.

[171 U. S., 505.]

Thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the Joint Traffic Association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western terminal of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares or charges, and its action in that respect was not to affect rates disapproved, except to the extent of its interest herein over its own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should cooperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were authorized in order to pay expenses, and the agreement was to take effect January

* Bill to enjoin the execution of an agreement claimed to be in violation of the interstate commerce act dismissed by Circuit Court for the Southern District of New York (76 Fed., 895). See p. 615. Decree affirmed by Circuit Court of Appeals, Second Circuit (89 Fed., 1020), memorandum decision. See above.

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1, 1896, and to continue in existence for five years. The bill, filed on behalf of the United States, sought a judgment declaring that agreement void. *Held*,

- (1) That upon comparing this agreement with the one set forth in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, the similarity between them suggests that a similar result should be reached in the two cases, as the point now taken was urged in that case, and was then intentionally and necessarily decided;
- (2) That so far as the establishment of rates and fares is concerned there is no substantial difference between this agreement and the one set forth in the *Trans-Missouri case*;
- (3) That Congress, with regard to the interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal, which shall restrain trade and commerce, by shutting out the operation of the general law of competition.*

[43 L. ed., 259.] †

[The right of a railroad company in a joint-traffic association to deviate from the rates prescribed, provided it acts on a resolution of its board of directors and serves a copy thereof on the managers of the association, who, upon its receipt, are required to "act promptly for the protection of the parties hereto, does not relieve the association from condemnation as an illegal restraint of competition, as the privilege of deviating from the rates would be exercised upon pain of a war of competition against it by the whole association.]

[Congress has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad companies to establish and maintain interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable.]

[Congress has power to forbid any agreement or combination among or between competing railroad companies for interstate commerce, by means of which competition was prevented.]

[The constitutional freedom of contract as to the use and management of property does not include the right of railroad companies to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable.]

* The foregoing syllabus and the abstracts of arguments copyrighted, 1898, by Banks & Bros.

† The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 48, p. 259. Copyrighted, 1899, by The Lawyers' Co-Operative Publishing Co.

Statement of the Case.

[The statute under review is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof.]
 [An agreement of railroad companies which directly and effectually prevents competition is, under the statute, in restraint of trade, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads and give the survivor power to raise rates.]

THE bill was filed in this case in the Circuit Court of the United States for the Southern District of New York for the purpose of obtaining an adjudication that an agreement [506] entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution.

These railroad companies formed most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast, and the object of the agreement, as expressed in its preamble, was to form an association of railroad companies "to aid in fulfilling the purpose of the Interstate Commerce act, to coöperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." To accomplish these purposes the railroad companies adopted articles of association, by which they agreed that the affairs of the association should be administered by several different boards, and that it should have jurisdiction over all competitive traffic (with certain exceptions therein noted) which passed through the western termini of the trunk lines (naming them), and such other points as might be thereafter designated by the managers. The duly published schedules of rates, fares and charges, and the rules applicable thereto, which were in force at the time of the execution of the agreement and authorized by the different companies and filed with the Interstate Commerce Commission, were reaffirmed by the companies composing the association. From time to time the managers were to recommend such changes in the rates, fares, charges and rules as might be reasonable and just and necessary for governing the traffic

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covered by the agreement and for protecting the interests of the parties to the agreement, and a failure to observe such recommendations by any of the parties to the agreement was to be deemed a violation of the agreement. No company which was a party to it was permitted in any way to deviate from or to change the rates, fares, charges or rules set forth in the agreement or recommended by the managers, except by a resolution of the board of directors of the company, and its action was not to affect the rates, etc., disapproved, except to the ex- [507] tent of its interest therein over its own road. A copy of such resolution of the board of any company authorizing a change of rates or fares, etc., was to be immediately forwarded by the company making the same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon the receipt of such resolution the managers were "to act promptly upon the same for the protection of the parties hereto." It was further stated in the agreement that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

One provision of the agreement was to the effect that the managers were charged with the duty of securing to each company which was a party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as it could be legally done. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which might decline or fail to observe the rates, etc., established under it, and the interests of parties injuriously affected by such action of the managers were to be accorded reasonable protection in so far as the managers could reasonably do so. When in the judgment of the managers it was necessary to the purposes of the agreement, they might deter-

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mine the divisions of rates and fares between connecting companies who were parties to the agreement and connections not parties thereto, keeping in view uniformity and the equities involved.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be so arranged as to give proper representation to each company party to the agreement. Soliciting or contracting passenger or freight agencies were not to be maintained by the companies, except [508] with the approval of the managers, and no one that the managers decided to be objectionable was to be employed or continued in an agency. The officials and employes of any of the companies could be examined, and an investigation made when, in the judgment of the managers, their information or any complaint might so warrant. Any violation of the agreement was to be followed by a forfeiture of the offending company in a sum to be determined by the managers, which should not exceed five thousand dollars, or if the gross receipts of the transaction which violated the agreement should exceed five thousand dollars, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such gross receipts. The sums thus collected were to go to the payment of the expenses of the association, except that the offending company should not participate in the application of its own forfeiture.

The agreement also provided for assessments upon the companies in order to pay the expenses of the association, and also for the appointment of commissioners and arbitrators who were to decide matters coming before them. No one retiring from the agreement before the time fixed for its final completion, except by the unanimous consent of the parties, should be entitled to any refund from the residue of the deposits remaining at the close of the agreement.

It was to take effect January 1, 1896, and to continue in existence five years, after which any company could retire upon giving ninety days' written notice of its desire to do so.

The bill filed by the Government contained allegations showing that all the defendant railroad companies were common carriers duly incorporated by the several States through which they passed, and that they were engaged as such car-

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riers in the transportation of freight and passengers, separately or in connection with each other, in trade and commerce continuously carried on among the several States of the Union and between the several States and the Territories thereof. The bill also charged that the defendants, unlawfully intending to restrain commerce among the several States and to prevent competition among the railroads named, in respect to all their [509] interstate commerce, entered into the agreement referred to above, and it charged that the agreement was an unlawful one, and a combination and conspiracy, and that it was entered into in order to terminate all competition among the parties to it for freight and passenger traffic, and that the agreement unlawfully restrained trade and commerce among the several States and Territories of the United States, and unlawfully attempted to monopolize a part of such interstate trade and commerce. The bill ended with the allegation that the companies were preparing to put into full operation all the provisions of the agreement, and the relief sought was a judgment declaring the agreement void and enjoining the parties from operating their roads under the same. The defendant, the Joint Traffic Association, filed an answer (the other defendants substantially adopting it), which admitted the making of the contract, but denied its invalidity or that it is or was intended to be an unlawful contract, combination or conspiracy to restrain trade or commerce, or that it was an attempt to monopolize the same, or that it was intended to restrain or prevent legitimate competition among the railroads which were parties to the agreement. The answer, in brief, denied all allegations of unlawful acts or of an unlawful intent, unless the making of the agreement itself was an unlawful act. The answer then set forth in quite lengthy terms a general history of the condition of the railroad traffic among the various railroads which were parties to the agreement at the time it was entered into, and alleged the necessity of some such agreement in order to the harmonious operation of the different roads, and that it was necessary as well to the public as to the railroads themselves.

The case came on for hearing on bill and answer, and the Circuit Court, after a hearing, dismissed the bill, and upon

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appeal its decree was affirmed by the Circuit Court of Appeals for the Second Circuit, and the Government has appealed here.

Mr. Solicitor General for appellants.

The agreement violates the anti-trust law, because it creates an association of competing trunk line systems, to which is [510] given jurisdiction over competitive interstate traffic, with power, through a central authority, aided by a skilful scheme of restrictions, regulations and penalties, to establish and maintain rates and fares on such traffic and prevent competition, thus constituting a contract in restraint of trade or commerce among the several States, as defined by this court in the *Trans-Missouri case*, 166 U. S. 290.

That case was elaborately argued and carefully considered. A petition for a rehearing was presented and denied. The decision has been accepted and acted upon by the Departments of the Government, and by the courts, both state and Federal, as definitively settling the meaning and scope of the anti-trust law when applied to traffic associations among competing interstate railway systems. The decision was not only a just, but an eminently salutary one. I shall not concede that the principles it laid down remain questionable. I shall not admit that it is necessary for me, by argument, to fortify the position taken by this court in that case. The anti-trust law, as there construed, is the law of the land.

The wisdom of Congress in prohibiting *all* agreements in restraint of trade among interstate railway systems is even more manifest now than when the *Trans-Missouri case* was decided. At the time of the argument of the *Trans-Missouri case*, it was still to some extent a mooted question whether the Interstate Commerce Commission was empowered to determine what are fair and reasonable rates, and to enforce such rates. This question is no longer open. *Interstate Commerce Commission v. N. O. & Tex. Pac. Railway*, 167 U. S. 479; *Interstate Commerce Commission v. Alabama Midland Railway*, 168 U. S. 144.

If it be urged that any illegality in the agreement is cured by section 3 of article 7, providing that "the powers conferred upon the managers shall be so construed and exercised

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as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall coöperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

An injunction to construe and exercise powers conferred so as to permit no violation of law, is an admission that the powers may be so construed and exercised as to violate law. If the anti-trust law prohibited only those contracts in unreasonable restraint of trade or commerce there might be saving force in this section. But the anti-trust law prohibits *all* contracts in restraint of trade or commerce. Whether the rates be reasonable or unreasonable, an agreement providing for their establishment and maintenance by an association of interstate railways, is prohibited. The managers can exercise none of the essential powers conferred by the agreement without violating the law. In the matter of the essential powers, it is not a question of method or degree; the powers cannot be exercised, because they are in themselves illegal. The association itself is illegal. It is formed for the purpose of controlling certain competitive traffic. The central authority—the managers—is given the power to establish and maintain rates on that traffic. Take away from the association the power to establish and maintain rates, and it immediately falls to pieces. It ceases to have a *raison d'être*.

The authority of the Government to maintain this suit is sustained in *United States v. Freight Association*, 166 U. S. 290, 343, citing *in re Debs*, 158 U. S. 564; *Cincinnati, New Orleans, &c. Railway v. Interstate Commerce Commission*, 162 U. S. 184; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197.

Mr. James C. Carter (with whom was Mr. Lewis Cass Ledyard on the brief), for the Joint Traffic Association, appellee.

There are certain observations in relation to the Anti-Trust act which are properly to be made before proceeding to the argument.

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There is no doubt that prior to and at the time of the passage [512] of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited, in some minds, much alarm. Many industries were seen, or supposed, to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of "trusts," and this term came to be employed, in a general way, to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be a rather reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield a greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends and, perhaps, the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed themselves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a "trust" to be legally defined so that a prohibition of it should not include a prohibition of [513] the exercise of the clearest constitutional

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rights? Congress, surely, could not prevent the creation of corporations under state laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of States. And was it certain that these so called trusts were, in every instance, necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts," or limit aggregations of capital in any form. The general charge was that these combinations were in some form monopolies, and in restraint of trade, but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies, or restraints upon trade, they should be prohibited from so doing in the future; and this is what Congress did and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined, are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

[514] The first question we design to consider is whether the agreement violates any of the provisions of the act re-

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ferred to. To this end it is of much importance to have in mind the particular nature of the subject with which this act deals, and how that subject has heretofore been treated in law and legislation.

It is immediately obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

We next observe that it is not contracts only of a certain character which are condemned, but that they are coupled together with certain other acts, presumably of a similar nature or tendency, namely, combinations or conspiracies in restraint of trade, and monopolies, or combinations or conspiracies to monopolize. Contracts, therefore, are dealt with, not so much as contracts, but as one form of acts relating to trade and commerce assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to a sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy upon which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way in which they are treated in the law. One description embraces simply ordinary business transactions, where parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar instances of this character.

[515] Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the

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law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs therefore to the law of contracts, and the treatises on that law usually embrace a chapter devoted to it.

But there is another and much smaller description of contracts supposed to be injurious to trade of quite a different character. They are not, properly speaking, business transactions. They do not involve the sale, leasing or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a common interest, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers, or employers, unite, in the form of agreement, to regulate hours of labor, or prices, or where merchants, or tradesmen, combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to suppress, or regulate, competition among themselves; or where a class of producers or dealers combine together to control a product, or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

[516] The marked distinction between these cases and the ordinary business transactions first spoken of is, that in the latter there is a difference of interest, sometimes regarded as

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a hostility of interest between the parties, each seeking to gain the utmost from the other; whereas, in the former, the parties are in the same interest, each seeking the same end. The term "contract" does not well express this sort of agreement. It is a uniting together for a common purpose—a combination—or, when thought to be of an objectionable character, a conspiracy. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but, in giving it this name we should not lose sight of its real character. In reality it is simply an act, and innocent, or guilty, according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for repression, it is not enough to simply declare it illegal. The practice may, nevertheless, be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which law usually takes in respect to such so called contracts is in the form of prohibition and penalty, and the subject belongs not to the law of contracts, but to the criminal law, where it is usually dealt with under the head of conspiracy.

We do not mean by the above observations that there may not be instances which partake, to a greater or less degree, of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust act belongs, is manifestly the one last described. The circumstance that contracts are grouped together with combinations and conspiracies and made the subject of criminal treatment, shows this very plainly.

The ineptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to [517] reach that class of supposed mischiefs which flow from combinations. But the great bulk of the cases, probably nine tenths, in which courts have felt called upon to say anything about contracts in restraint of trade, has been the

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business transactions first alluded to in which an agreement has been entered into, not to exercise a particular calling, as where the keeper of a well-patronized tavern sells out his establishment and good will, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but, surely even when void, there was nothing about them calling for the intervention of the criminal law. And yet this statute bunches the valid and the void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed, would be, assuming that the act covers contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were, in fact, in restraint of trade or commerce between the States. That it is, in fact, in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this court, and we expect to be able to show that the agreement is not only not in restraint of trade and commerce, but highly beneficial to both; that Congress has never declared, or intended to declare, it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objection on constitutional grounds, which will be dealt with by other counsel.

Having presented this preliminary matter, *Mr. Carter* argued the following points.

I. The court has no jurisdiction to entertain this suit, unless it can be found in the provisions of some statute.

The bill sets forth simply the commission of a misdemeanor, [518] and an intention on the part of the defendants to repeat the offence. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary courts of common law, is sufficient for the repression of

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crime, and exclusive adhesion to it necessary for the protection of the citizen.

II. The Anti-Trust act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and, perhaps, the decision made by this court in the suit of the *United States v. The Trans-Missouri Freight Association*, should be regarded as a determination that the Attorney General was at liberty in case of any violation of the provisions of the act to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition, in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication, at least, it is withheld; for in certain cases specially mentioned in sections 6 and 13, jurisdiction is expressly given to courts of equity to grant injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. "*Expressio unius est exclusio alterius.*"

III. A clear understanding should be had at the outset, of the meaning of the terms with which we are dealing. The class of contracts condemned by the Anti-Trust act is defined by the effect they have upon trade or commerce. They are such, and such only, as have the effect of restraining trade or commerce. The actual effect which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

This may seem self-evident, and indeed is so. But the possible suggestion might be made that there is a class of contracts, called, or named, "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect. There is no foundation for such a suggestion. There [519] is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever, heretofore, the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined

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by an inquiry as to its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might, or might not, be called or styled a contract in restraint of trade.

Moreover we are dealing with the criminal law, which never classes acts and makes them punishable under arbitrary names, without regard to their supposed effects, as being actually mischievous or otherwise. This would be putting innocence on a par with guilt.

IV. There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To restrain is to hold back, to check, to prevent, and thus to diminish. It is injury to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract injures and thus diminishes, or tends to diminish, trade or commerce, it cannot be deemed as in restraint of trade or commerce.

V. The agreement under which The Joint Traffic Association was formed; and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the act of July 2, 1890.

[Over one hundred pages of appellant's brief are taken up with the discussion of this point. The following synopsis of its reasoning was filed by counsel.]

The bulk of the whole discussion, so far as respects the Anti-Trust act, is contained under this Fifth Point, and the line of argument pursued is substantially as follows: (1) That no restraint is directly, or in terms, imposed upon trade or commerce; that all the members of the association will, as the agreement assumes, continue in business, doing the utmost they can, and in competition with each other; that whatever restraint is imposed by it is imposed simply upon a single feature of this competition; that, competition and trade not being identical with each other, a restraint upon competition is not necessarily a restraint upon trade. It is admitted, how- [520] ever, that a restraint upon competition may be a restraint upon trade; but it is asserted that whether it is so or not, in any particular case, depends upon the nature and effect of the restraint imposed in such case.

(2) The argument thus reaches one of the main subjects of discussion, namely, what the effects of competition in trade

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are; when they are good, and when, if ever, they are bad; and how such restraints have been regarded in public economy, law and legislation. This subject is treated at first generally, without reference to the particular effects of competition in the business of railroad transportation.

(3) It is then pointed out that the particular field of discussion in the case has been, by what precedes, fully disclosed, namely, the effects of restraints upon competition as restraining, or not restraining, trade and commerce, and a particular proposition, substantially equivalent to the main one, is stated as follows:

"The agreement in question, as a whole, and, particularly, so much of it as affects competition, is in the highest degree promotive of trade and commerce." The discussion on this head pursues the following course:

(a) It begins with a statement of "the origin, development and present condition in this country of the business of railway transportation," and shows that by the deliberate policy of all our governments, state and National, business has been, from the first, subjected to the severest involuntary competition, and it points out the ruinous results to which such competition leads when it takes place on rates, and aims to show that such results can be arrested, or mitigated, only by allowing the competing parties to displace the strife by some form of agreement. (b) This discussion is proceeded with by pointing out what the main requisites of a good railway service are, and how they are affected by railway competition in rates. It aims to show that such competition, by making uniformity in rates impossible, makes it impossible to secure any of these essential requisites, and that they can be secured only by some form of concerted agreement between the parties.

[521] (4) The subject of agreements between railway companies and coöperative traffic associations being thus reached, a sketch is made of their origin and development down to the time of the passage of the Interstate Commerce law, and it is shown that the most efficacious form of agreement down to that time had been found to be that of pooling.

(5) The Interstate Commerce law and its effects are then discussed, and it is shown that one of its main objects was to

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bring about, so far as Federal legislation could accomplish it, uniformity in rates, and thus put an end to the practice of discrimination, and attention is called to the incidental feature of the law which prohibited pooling agreements. It is then shown that the effect of that law was to increase and aggravate the very evils which it was designed to remove. Pooling being prohibited, the most effective method for securing uniformity in rates could no longer be employed, and ruinous competition, with every form of discrimination, followed, and to these evils was added the unendurable aggravation that the practices which the law could not prevent, were, nevertheless, converted into crimes.

(6) It is then shown that the necessity was universally felt for some form of concerted action which would put an end to these deplorable conditions and that the present agreement was the result of an earnest effort in this direction.

(7) An analysis of the agreement is then made, and it is pointed out that it is not aimed against competition in general, but assumes that such competition will still continue actively and earnestly on every point except that of rates.

Its precise effect upon competition in rates is dealt with, and it is shown that while its object is to secure uniformity in rates by inducing competing companies to consent to such uniformity, it does not purport to require it or compel it. That it does not really, or in any proper sense, seek to restrain competition at all, but aims to render competition open, honest and lawful, so that the business of railway transportation may be conducted in conformity with the requirements of the Interstate Commerce law, and without the daily commission of crime. It shows that, to this end, it is necessary that each railroad [522] company should first establish its rates and should adhere to them for a reasonable period, which is fixed at thirty days, in order if it intends a change that it may give reasonable notice of its intention in time to enable the competing parties to meet it, and to shape their own conduct accordingly; that this is absolutely the only restraint upon competition effected by the agreement, and being only slight and temporary, and necessary in order to enable competition to be open and lawful, cannot be regarded as a restraint upon trade. It admits that one of its main objects

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is to secure what the Interstate Commerce law sought to secure, uniformity in rates, but its method of effecting that result is, not by a compulsory agreement, but by taking away the motives to ruinous, secret and unlawful competition in rates. It also points out the many other beneficial provisions of the agreement by which it is sought to make the railroad transportation of the country regular, orderly, safe and effective.

(8) It further seeks to emphasize the beneficial purposes of the agreement by showing that every great industry in which the coöperation of many different proprietors and agencies is required, necessarily calls for a system of regulation which must be supplied either by the action of government, or, in the absence of such action, by the voluntary action of those who are engaged in it, and it pronounces the association as "an institution for the regulation of transportation business in those respects in which the State, either from lack of jurisdiction, or because it deems that the regulation could be best devised and administered by the railroad systems themselves, has choosen not to regulate it."

(9) Throughout this part of the argument the central proposition is that of the absolute necessity for some agency by which uniformity in rates may be brought about, and a uniformity not only in the case of merchandise shipped from the same point to the same terminus, but also in the case of merchandise shipped from, or to, any points in any way competing. So long as competition in rates exists different men and different places will necessarily be put up, or pulled down, enriched or ruined, as one railroad company may think it to be [523] for its interest to make lower rates than another, and without regard to comparative skill, industry or other natural advantages which furnish the true and only field for useful competition. Railway transportation is a public function, and absolute neutrality in relation to the multitudinous competitions of life is an essential condition of its just discharge. This neutrality can be secured only by uniformity in rates. If this is not secured by Government it must be brought about by some private agency. It cannot be secured by governmental action, because the Government has committed the business to private hands.

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The Interstate Commerce law had this uniformity for its prime object; and went to the limit of Congressional power in the effort to accomplish it. The prime object of the present agreement is to supplement the effort, not by compulsorily restricting competition, but by taking away the motives to it. It is asked whether it is possible to regard an organization formed to effect an object which the law and public policy unite in viewing as essential, but which Congress cannot by law reach, as a restraint upon trade? It is believed that when this single subject is considered in all its various relations, it is, of itself alone, decisive of the whole controversy.

(10) The important matter of the classification of freight is taken up and considered, and it is shown that the great end of uniformity in rates cannot be attained without a system of classification; that classification is only a part, although a necessary part, of rate making; that its only object and purpose is to make uniformity in rates possible; that it has never been attempted, except as part of an effort to bring about such uniformity, and can never be perfected, or even preserved, except upon the condition of such uniformity.

(11) The general usefulness of the organization formed by the association is dwelt upon by calling attention to the multitude and variety of subjects upon which it is daily engaged, and especially to its constant occupation with the question, how any particular rates which may happen to have been established, or which may be proposed to be established, affect different places and different merchants or manufacturers engaged in the same business, and who are in competition with each other, whether they may be a few miles or hundreds of miles apart. It is asserted that the association becomes the practical arbitrator in cases where the Interstate Commerce law cannot operate between competing merchants and manufacturers, and between competing places, as to what rates even-handed justice to all requires; that from the nature of the case and the interest of the railroads themselves, no rules can be adopted for decision of such questions except those of justice and equality, and that it is practically impossible that it should be made a medium of monopoly, or for the exaction of anything more than reasonable charges; and that

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this is proved by a reference to the course of railroad charges during the whole period, embracing many years, in which such agreements have existed, the fact being that they have continually declined from the rate of about three cents a ton or mile to less than one cent a ton or mile, a rate lower than that of railway transportation in any other quarter of the world.

(12) The argument then refers to the matters of fact which were involved or assumed in the foregoing discussion, and justifies whatever assumptions have been made in the following ways: (a) That, by the very nature of the case, they are matters which must necessarily be true, because they are the results of the operation of the familiar and well-known laws relating to industrial pursuits. (b) Because they have that notoriety which requires a court to take judicial notice of them. (c) Because they are fully established by averments in the answer admitted by the appellant in setting down the cause for hearing upon bill and answer. (d) By the declarations, repeated in multiplied forms, of the Interstate Commerce Commission, the great public agency which has such supervision and control over the business of railway transportation as Congress can assert. Copious extracts from these declarations are set forth.

(13) These extracts and other proofs thus referred to are again declared to stamp this association as one instance, of which industrial life furnishes a multitude, where industrial [525] interests of great magnitude are subjected to private regulation, and for the reason that the State recognizes, and always has recognized, the fact that such regulation is far more effective over a large range of subjects than any which the State itself could devise and enforce. This statement is confirmed and illustrated by reference to many different instances. (a) To the multitudinous associations among workmen and employes of various descriptions, all based upon agreements far more in restraint of competition than any contained in this instrument. (b) Similar unions among the employers of labor. (c) To the numerous Commercial, Stock and Produce Exchanges and Boards of Trade, all of which prescribe rates of commission and for compensation for various services, and forbid any departure from them,

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and are far more restrictive of competition than any provision in the agreement in question.

(14) The question is submitted whether trade is in any way restrained by the agreements between laborers and employés, or those between the employers of labor, and it is answered by saying that the final and general results, notwithstanding occasional abuses, are greatly to increase the efficiency of labor and the amount of work done, and to elevate the character of the laboring classes. The same question is asked in respect to Commercial Exchanges and Boards of Trade, whether they restrain the business with which they are conducted, whether there is less buying or selling of goods in consequence of commissions or other charges being fixed at particular sums. It is answered by saying that, as every one knows, these are all agencies by which the number and magnitude of business transactions is enormously increased.

The same question is put in relation to the operation of the present agreement, or of any agreement tending to secure uniformity in railroad rates and the stability, certainty and safety of railway transportation; and it is asked whether, in consequence of such agreements, the business of railway transportation or the exchange of commodities is in any particular diminished, and whether it is not, on the contrary, prodigiously extended and enlarged.

[526] (15) Under general subdivision V the conclusion to which the foregoing line of argument leads is drawn in these words: "That the agreement which this action seeks to condemn is not by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce, but is on the contrary highly needful to, and promotive of, both."

Its necessity to beneficial purposes, as thus established, is then separately pointed out by way of summing up: (a) Its necessity to stability in rates. (b) Its necessity to uniformity in rates and to prevent unjust discrimination. (c) Its necessity to secure the general benefits of harmonious coöperation in classification and interchange of traffic. (d) Its necessity as a supplement to the Interstate Commerce act, and in order to make the objects of that act attainable. (e)

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Its necessity for the prevention of crime, for its punishment when committed, and for the prevention of perjury, committed in order to conceal crime.

VI. If the Anti-Trust act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow. (1) That all railroad transportation be abandoned; or, (2) The consolidation of all competing railroads under a single ownership, either governmental or private; or, (3) That all competing railroad business must be carried on in constant and daily violation of criminal law. Of these alternatives neither the first or the second can be contemplated as possible. Railroad transportation cannot be abandoned, and no governmental ownership can, under present, or any probably near future conditions, be brought about. We have no sovereign government possessing the requisite powers. It is the third alternative which must follow.

VII. These positions are fully supported by the weight of authority.

VIII. The agreement is in no manner in violation of the provisions of the second section of the act. It creates no monopoly, nor is it an attempt, or conspiracy to monopolize.

IX. In the attempt, made by the bill, to array every possible objection to the agreement, there is an evident purpose to [527] suggest that its eighth article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of section 5 of the Interstate Commerce act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce law.

Mr. E. J. Phelps for the New York Central and Hudson River Railroad Company, appellee.

I. As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken as true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill. The facts on which the case stands are therefore to be found exclusively in the answers, either in the admissions or in the responsive averments which they contain.

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II. The denials in the answers completely negative all the charges of illegal intent on the part of the defendants which are contained in the bill, unless they are found to result necessarily from the terms of the agreement itself.

III. Whether the agreement by its terms violates the Federal law, depends entirely on the inquiry whether it conflicts with any statute of the United States. The bill is not based upon any statute, but proceeds apparently upon common law grounds. No statute is referred to, or charged to have been violated.

IV. The only statutes of the United States that are claimed to be infringed by the terms of the agreement, are the Interstate Commerce act, of February 4, 1887, amended by acts of March 2, 1889, February 10, 1891, and February 8, 1895, and the Anti-Trust act of July 2, 1890.

V. The agreement violates no provision of the Interstate Commerce act. The only provision in that act that is claimed to be infringed, is contained in § 5, which prohibits "pooling." "Pooling" means a division of the money earnings of traffic, which this article does not contemplate.

VI. Even assuming that this clause in the agreement can be construed into a violation of the 5th section of the Interstate Commerce act, this suit would not be maintainable, because it is unauthorized by that act, and precluded by its express provisions. This court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States Government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offence; unless such power is specially conferred by statute. No such power is granted.

VII. The Anti-Trust act of July 2, 1890, does not apply to the business of railway transportation. It will be claimed that the decision of this court in the case of the *Trans-Missouri Association*, 166 U. S. 290, is decisive upon this point, as well as upon the further question whether the agreement here under consideration is a violation of the provisions of the Anti-Trust act. It will be found on comparison that very material differences exist between the agreement shown in that case, and the case that is presented here. So that the

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decision there is by no means controlling in the present case. These points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated. But we conceive it not to be improper, so far as it may be necessary, respectfully to ask of the court a reconsideration of the conclusions reached by the majority of the judges in that decision, which overrules the judgment of six United States Circuit and District Judges who sat in the different stages of that case and this.

The argument in opposition to it has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it, nor is it necessary to repeat it.

VIII. Assuming for the purposes of the argument, that the Anti-Trust law does apply to railway traffic contracts, no provision of that law is violated by the agreement now under consideration.

The prohibitions of the act are two: 1. Against contracts, combinations or conspiracies in restraint of trade or commerce. 2. The monopoly of, or the attempt or combination to monopolize any part of the trade or commerce of the States, or with foreign nations.

[529] The agreement in this case is not "in restraint of trade or commerce." The theory of the bill appears to be that the agreement comes within this description, because it tends to restrict competition, and because any agreement that restrains competition is "in restraint of trade." Both these assumptions are erroneous, the one in fact, the other in law. The agreement does not restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

Assuming, against the fact, that a certain restriction of competition is the necessary result of this agreement if it is allowed to proceed, it plainly appears by its terms to be only such restriction of competition as is necessary to secure "just and reasonable rates."

By the Interstate Commerce act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates, as has been pointed out, are required to be published and kept open to

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public inspection, and to be filed with the Commissioners; and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners, and the companies are also made subject to the state laws regulating rates.

The precise question, therefore, under this clause of the Anti-Trust act, is whether a contract that produces a result which the Interstate Commerce act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is for that reason a contract for the unlawful restraint of trade. Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce act prohibits.

It is the statutes themselves that have prescribed a definition [530] of this clause of the Anti-Trust act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of transportation which the Interstate Commerce act contemplates and provides for, are rates that are just and reasonable to the carriers as well as to the carried, cannot be open to doubt. The very words "just and reasonable" employed in that act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered, there can be no comparison. It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other. This is the construction which this court have given to the Interstate Commerce act in this very particular.

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust act taken by itself, but by that language consid-

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ered in connection with the other statute of the United States which (if this applies) is *in pari materia*, and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect to them. Granting that the Anti-Trust act in terms makes all contracts unlawful that are in anywise "in restriction of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce act as construed by this court recognizes as the right of railway companies to receive, and provides means to secure? It will hardly be claimed that the elaborate provisions of the Interstate Commerce act on the subject of reasonable rates are repealed by the Anti-Trust act. If both are to stand, as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Quite aside from the provisions of the Interstate Commerce act, giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same [531] result is reached under the principles of the common law. The term "restraint of trade" employed in the Anti-Trust statute has a common law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the agreement an infringement of this statute, it must, therefore, be one that would be void at common law. It is respectfully submitted on this point that in the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well-settled common law definition distinct from its literal meaning, that is assumed to be the meaning intended, unless a different definition is prescribed in the statute. Even the Constitution of the United States, a political document of an entirely unique character, has been from the outset subjected by this court to this rule of construction.

Even if it should be held that the language of the Anti-Trust act forbids any contract in restraint of trade, however just, reasonable and necessary, the agreement here in question would not fall within the prohibition, because it does

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not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

The view is so fully presented and discussed in the brief of Messrs. Carter and Ledyard, that further argument in support of it is not requisite.

There is no ground whatever for asserting that the agreement infringes the provision of the Anti-Trust act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or at most, of a few. That is the plain meaning of it as employed in the act. No feature of the agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

[532] Its effect will be, if it is successful, not to diminish, but to increase transportation facilities, by preserving roads that might otherwise be driven from the field.

IX. If the construction of the Anti-Trust act which was adopted by the court in the *Trans-Missouri* case is to stand, it is respectfully insisted that the act, so far as thus interpreted and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the *Trans-Missouri* case, because no such construction of the act was anticipated by counsel. Nor was it considered by the court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered, unless raised by the party affected.

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The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether the agreement here under consideration is one that may be prohibited by legislation, without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

In the *Trans-Missouri* case, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and the minority opinions of the court, that its substantive character and purpose were such as the answers in the case aver and set forth. It was for this reason believed by the minority of the judges that it could not have been the intention of Congress that such a contract should be made a penal offence. But it was held by the majority that the language of the act admitted of no other construction. Though it was conceded in the opinion of the court that the arguments against that conclusion "bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply [533] of maintaining those rates which were reasonable and fair." And in the opinion of the minority of the court by Mr. Justice White, he remarks, after stating the general features of the contract, "I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court rests upon that hypothesis."

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust act, as so construed, is thus both established and conceded, and the question distinctly arises, whether legislation having such a result is within the power of Congress.

That the operation of the act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants (whether rightfully or not) of both liberty and property to a very grave and perhaps ruinous extent, is not open to question. A just freedom of contract in lawful business is one of the most important rights reserved to the citi-

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zen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment. And when any class in the community is so precluded, it is to that extent "deprived of the equal protection of the laws." These are elementary propositions in constitutional law, and have been often asserted by this court.

In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust act, if it is held applicable to the agreement in this case, we respectfully insist: (1) That the act deprives the defendants of both liberty and property, by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do. That no such contract can be prohibited by law without a violation of the [534] constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it. And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

(2) That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because (a) Those intended to be benefited are not the public, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection. (b) Even if such class is held to constitute the public, it is not entitled to the suppression of all restriction upon competition. Because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labor and property without just compensation. (c) The legislation in question

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is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object, is already effectually provided for by full and careful Congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public. (d) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity, and would injure rather than benefit the very class in whose behalf it is contended for.

(3) That even if it were admitted that further legislation against restrictions upon competition was both constitutional and necessary, the provisions of this act, in forbidding all such restrictions, are not justly adapted to the only end that is [535] admissible on public policy. If this one is of that character it must fail, but if not, it cannot be made unlawful because it is unnecessary. Few special contracts would be necessary if all parties concerned in the transactions to which they refer would always do right.

Mr. George F. Edmunds for the Pennsylvania Railroad Company, appellee.

Before the agreement in question was made, the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation.

This is admitted by pleadings.

This being true, these rates could not have been either raised or lowered, under then existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against

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justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations, as follows:

(1) To aid in fulfilling the purposes of the Interstate Commerce act; to coöperate

(2) with each other and adjacent transportation associations to establish and maintain

(3) reasonable and just rates, fares, rules and regulations on state and interstate traffic; to

(4) prevent unjust discrimination, and to secure the reduction and concentration of agencies

(5) and the introduction of economies in the conduct of the freight and passenger service.

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other [536] purpose, and no secret or covert design in respect of the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named."

The first six articles of the contract provide for organization and administration, in respect of which no criticism has been suggested, except as to section 5 of Article V in connection with the Solicitor General's contention in regard to Article VII.

Article VII is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law, it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides:

"SECTION 1. The duly published schedules of rates, fares and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares and charges, and the rules applicable thereto."

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This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the preëxisting just, reasonable and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain [537] words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or any sense whatever. In the instance of this first provision of the agreement, they have engaged to do that very thing and that very thing only in the form of specific language referring to a specific and existing just, reasonable and lawful state of things which they were then acting upon.

The second section of Article VII is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer to this is that the pleadings distinctly admit that there was no evasive intention, or other unjust purpose, in any part

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of the arrangement. It is, therefore, not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this section, it is sufficient to say that the very next section of the same article declares that—

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co- [538] operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers, as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce act, or any other law, and so forth; and it commands the managers to coöperate to these ends with the Interstate Commerce Commission.

When the managers come to act, then, under these powers, how do they start? They start with a system of rates established, not by the agreement, but before it was made, and confirmed by the agreement, which were confessedly in conformity with and in promotion of the Commerce act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the second section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all, and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned contained in the Commerce act. Can this be an authority to restrain trade under any definition of the word "restraint"? The only restraint is a restraint against a violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce act. If we assume that the

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restraint of trade mentioned in the Trust act may be a restraint of innocent and just proceeding, can any one maintain that it makes illegal an agreement not to violate law, but to obey it?

It was obvious when this agreement was made that rates then existing and being in all particulars reasonable and equal, might, in the course of changes in production, trade, and under other conditions over which the railways could have no control, [539] become unjust, unreasonable and inapplicable to the new conditions, and that in such case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice and law should require under such conditions. It was to provide for this that sections 2 and 3 of the seventh article were inserted. As I have said, they were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbidden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company, or any number of companies affected, could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But it is asked, would not the road thus refusing be subjected to the fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could compel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce act itself in terms requires the same reasonable and just conduct by railways towards

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each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of Article VII is perfectly valid under any possible construction of the language of the Trust act, as well as in perfect conformity with and in aid of the Commerce act.

I may as well here compare the provisions of Article VII, which contains the great leading feature of the whole agreement [540], with the agreement in the *Trans-Missouri case*. The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in the first section of Article VII had already been independently established, were, in fact, reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission, and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interests of the country. It was an engagement to stand by that state of things and for the express purpose of continuing that happy state of things—exactly those that the law requires—that this engagement was made. Turn now to the *Trans-Missouri* agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, etc.; and, in the very words of the agreement, for the purpose of mutual protection, and for nothing else.

The *Trans-Missouri* agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and did not, evidently, intend to impose the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping up and increasing rates, instead of for the purpose (as in the *Joint Traffic agreement*) of keeping them just and in con-

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formity with law, whether by reduction, increase or other readjustment.

Other essential differences are stated in my brief which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that [541] existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a coöperative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the *Trans-Missouri* case alleged—there being, it will be remembered, no previously established rates that were agreed upon—that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated in my brief. The practical construction by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts.

The next principal contention of my learned brother is that Article VIII of the agreement violates the Trust act by restraining trade.

The words of the article are as follows:

“ARTICLE VIII.

“PROPORTIONS OF COMPETITIVE TRAFFIC.

“The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done.”

This article provides that the managers shall endeavor so far, and so far only, as obedience to law—that is to say, conformity with the Commerce act and conformity with the Trust act—would permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is a sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than as the law shall

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permit. If, therefore, the Trust act condemns the effort referred to, then not to make the effort. If the Interstate Commerce act, either in terms or spirit, is adverse to such an effort the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in [542] the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads, passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads was necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the eighth article then, I submit, was wholesome, lawful and necessary, and it was the very thing that one of the clauses in the Commerce act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a restraint of trade, in one sense or another. It will be seen on examining the agreement that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the association. This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can

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be established that the thirty days' notice was too long. It is a matter of history that when the Commerce act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should [543] be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce act for notice was much too short, and that unjust inequalities have arisen, again and again, from changes in rates by particular roads on such short notice that favored customers and favored localities, etc., would get advantages over others, in violation of the spirit and substance of the Commerce act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads and all communities, that this period of thirty days instead of ten was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as it regards the provision I have just spoken of, as well as it regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support of and in promotion of trade. Trade is a general word, and its operations, like all other operations that require co-operating and associating forces and arrangement, are advanced by, and indeed, cannot be carried on truly and honestly for public interests without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain but advance and promote the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics, the safety valve of a locomotive, with its counterweight, regulates and restrains, or gives off, the accumulating steam in

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the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all [544] this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of the trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it, even as an incident. Wherever it is practised, it is practised apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various important points to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one State to another.

I refrain from making any observations on the constitutional question arising if the Trust act is to be construed as forbidding innocent contracts promotive of public policy, which I have insisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter is left entirely to my brother Mr. Phelps.

In respect of the meaning of the words of the Trust act, I beg to ask your Honors' careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and, second, to the citations I have made from law writers, show-

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ing a distinct and separate classification of the two phrases, [545] "restraint of trade in general" and "partial restraint of trade." If these writers are correct (as nobody doubts, I think, they are), and the two phrases were known and treated in the law at the time of the passage of the act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the act shall be assigned to the first class, and not carried over into the second.

Mr. Solicitor General, for the United States, in conclusion.

I. It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the Anti-Trust law makes the agreement illegal and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provision of the law declaring the illegality and authorizing injunction proceedings.

II. It is insisted that an agreement in restraint of trade must restrain trade—that is, reduce or diminish it; that *trade* must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the Government and people from the creation of monopolies. It is a question of method rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life.

III. It is said that competition is not trade, but a mere

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incident of trade; that what prevents competition does not [546] necessarily injure trade; on the contrary, to restrict competition may benefit trade, that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the mass of the people: that there is a spirit of unrest, of dissatisfaction, and that to avoid the effects of ruinous competition among employers and employes combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it. Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand—a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result not from competition, but the throttling of competition by trusts and combinations, which seek to control production and transportation and dominate both workingmen and consumers. Against these the individual citizen protests. He does not demand *no* competition, but *fair* competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

IV. It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it cannot stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a [547] valuable plant cannot be withdrawn, nor can labor

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skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all. There are sections where a number of years ago it was profitable to make iron out of local ores. Millions of dollars were invested in furnaces. Workingmen skilled in iron-making settled there, and with their earnings bought property and built homes. Subsequently, in other sections more accessible to the markets, with cheaper ores, modern furnaces were erected and cheaper iron began to be made. The old furnaces could not meet the competition of the new. They had to be abandoned. Was it possible to withdraw the capital invested in them? Not at all. It was lost. The workingmen, too, suffered. They were thrown out of work, ran up debts, lost their homes.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public, but the person or corporation or region which cannot lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive [548] business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest. The poorer roads can get

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the business by putting themselves in shape to do the business. Roads equally fitted to do the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result, naturally, not in ruining the roads, but in building them up. Under competition, the best road fixes the rate; under combination, the poorest road. Is it just to make the public pay rates from Chicago to the East fixed by the poorest system protected by the Joint Traffic agreement?

V. It is contended there is no restraint on trade, because the railways still exist with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate cannot be made except by resolution of the board of a member and after thirty days' notice to the managers.

It is true the railways exist with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the things transported. This operates as a burden upon commerce, and a restraint of trade.

If a State should levy a tax on goods transported through it, this court would hold such an act unconstitutional, because it laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition decreases the business of railroads but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates means less traffic. It may be to the [549] interest of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

VI. It is insisted that rates must be stable, not subject to change; that a manufacturer cannot safely make goods nor a

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dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious that the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter, by land and water, will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the Interstate Commerce law nor the Joint Traffic agreement attempts it. Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to the managers of the association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency towards cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.

VII. Uniformity in rates is declared to be essential, and it is urged that the provisions of the Interstate Commerce law favoring uniformity cannot be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the Interstate Commerce act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction in rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the [550] association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

The uniformity demanded by the Interstate Commerce act is uniformity in the treatment by *each* railroad of *its own* patrons. The second section prohibits a common carrier

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from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for an equal distance. The third section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or the places served by it. And so, too, with reference to the long and short haul provisions in the fourth section.

The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was forbidden. Competition between railroads was preserved, and to secure the benefits of competition to all patrons of each road it was provided that the competition should be open and above board, so that the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefits of competition to all, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it has to compete. The competition was to be restricted to where it belongs; between the railroads and not between the shippers. If a railroad can afford to carry the freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

VIII. It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in [551] operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it, each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centres. The argument, then, amounts to this, that the rates on through traffic are to be kept up in order to preserve the weak roads as going con-

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cerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of Government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of the land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

IX. It is said that the Interstate Commerce act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition, but to preserve it and secure its benefits to all. Competition between independent lines was preserved and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons were prohibited. Thus the benefits of open competition were insured to all. The policy was—among the patrons of each road uniformity, but between the roads open competition.

X. The point is made that railways are public highways, and the furnishing of railway transportation a governmental function; therefore the Government should eliminate the advantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the Government may regulate it. Government, state and Federal, has done this, by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable

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nor desirable. Absolute uniformity, extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolutely arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers, without distinction. Each railroad should be required to treat its patrons—persons and places—with fairness and equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary, it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this not only in rates but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for by Mr. Carter, would logically prevent all competition, whether in rates or service.

If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation of these roads now under the agreement. The public is not interested in consolidation except as it affects competition. The constitution and laws of many States prohibit the consolidation of railroads, but only of *competing* railroads. Lines which do not compete may consolidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the antipooling section of the Interstate Commerce act. The pooling of freights and the division of earnings is not bad in itself. It is bad, because used to stifle competition. Equally bad is the Joint Traffic agreement before the court, which operates as effectively as any pooling arrangement ever devised. The people have not stopped to inquire

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whether consolidation would result of necessity in unreasonable rates; neither have they stopped to inquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade.

The railroads say that if they are not permitted to prevent competition they will compete and in doing so violate the Interstate Commerce law; that they should be permitted to combine for the purpose of preventing violations of law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for law based solely on self-interest is delusive and evanescent.

XI. An attempt is made to distinguish this case from the *Trans-Missouri* case by saying that here the association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies; while in the *Trans-Missouri* case the association was given power to fix rates. But in the *Trans-Missouri* [554] agreement the association was only given power to fix reasonable rates, and the fact that the rates fixed by the association during its existence were fair and reasonable was admitted.

In the *Trans-Missouri* case, the association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve authority to keep them up after progress and invention should render them excessive and unreasonable. But in point of fact, as pointed out, the Joint Traffic agreement vests in the association, through the managers, with appeal to the

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board of control, the authority to change rates. This authority is more coercive than that conferred by the Trans-Missouri agreement.

Under the Trans-Missouri agreement five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting the association voted on all changes proposed. All parties were bound by the decision of the association "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association. . . . Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect upon the same day." Moreover, each member of the Trans-Missouri association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving the chairman notice of its action, so the good faith of the transaction might be passed upon by the association at its next meeting.

Thus, under the Trans-Missouri agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice, make an independent rate, notwithstanding the action of the association. But under the Joint Traffic agreement no company can [555] deviate from the rates as fixed by the managers, except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with the managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision that "the managers, upon receipt of such notice, shall act promptly upon the same for the protection of the parties hereto."

Mr. Carter, in his argument, explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by the association, through its managers, was required in order that the association might have time to

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determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of the association protected.

XII. It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give it to a poor road in order to do for it what the public along its line ought to do.

XIII. The provisions of the Interstate Commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without suppressing competition. The tenth article of the Joint Traffic agreement provides that "the managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement which fail or decline to observe the rates, fares and rules established under this agreement," and it is [556] contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the third section of the Interstate Commerce act shows that the mischief suggested is fully provided for in its concluding paragraph, which provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, "and shall not discriminate in their rates and charges between such connecting lines."

XIV. It is insisted that if Congress had intended the Anti-Trust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it

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would have used the language "every contract in *any* restraint of trade," etc., "is hereby declared to be illegal."

It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in *any* restraint of trade," and much better language. With due respect to the learned counsel, it might be suggested that if his criticism of the language used be a valid one, why may not the next commentator on this section forcefully insist that Congress should have said "every contract in *any and every* restraint of trade is hereby declared to be illegal" ?

XV. The reply to Mr. Phelps' attack upon the constitutionality of the Anti-Trust law as construed by this court in the *Trans-Missouri case*, is to be found in the argument of Mr. Carter that railways are public highways, and in the furnishing of public transportation perform in a sense a governmental function. The right of the Government to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The States regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn v. Illinois*, 94 [557] U. S. 113, applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the fifth section of the Interstate Commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling or the combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit

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it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

XVI. *As to the remedy in the case of an unreasonably low rate.* Judge Cooley, in a well-considered opinion, *In re Chicago, St. Paul & Kansas City Railway*, 2 Int. Com. Com. 231, approved by this court in *Interstate Commerce Commission v. Cincinnati, N. O. & Texas Pacific Railway*, 167 U. S. 479, 511, held that under the Interstate Commerce law the commission has no power to determine that a rate is unreasonably low and to order the carrier to refrain from charging such rate on such ground.

XVII. *As to the remedy in the case of an unreasonably high rate.*

The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

[558] Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive, he gets so much less for his grain or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the Interstate Commerce act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the Interstate Commerce law.

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Mr. James A. Logan and *Mr. John G. Johnson* filed a brief on behalf of the Pennsylvania Railroad Company and eight other railroad companies, appellees.

Mr. Robert W. de Forest and *Mr. David Willcox* filed a brief on behalf of the Central Railroad Company of New Jersey, appellee.

MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

This case has been most ably argued by counsel both for the Government and the railroad companies. The suit is brought to obtain a decree declaring null and void the agreement mentioned in the bill. Upon comparing that agreement with the one set forth in the case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases. The respondents, however, object to this, and give several reasons why this case should not be controlled by the other. It is, among other things, said that one of the questions sought to be raised in this case might have been but was not made in the other; that the point therein decided, after holding that the statute applied to railroad companies as common carriers, was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided, while it is plainly raised in this.

Again, it is asserted that there are differences between the provisions contained in the two agreements, of such a material and fundamental nature that the decision in the case referred to ought to form no precedent for the decision of the case now before the court.

It is also objected that the statute, if construed as it has been construed in the *Trans-Missouri* case, is unconstitutional, in that it unduly interferes with the liberty of the individual and takes away from him the right to make contracts regarding his own affairs, which is guaranteed to him by the Fifth Amendment to the Constitution, which provides

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that "no person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." This objection was not advanced in the arguments in the other case.

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention, because, as is stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-Trust statute has been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the *Trans-Missouri case* clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case on the part of the Government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account. If [560] the agreement did not in fact restrain trade, the Government had no case.

If it did not in any degree restrain trade, it was immaterial whether the statute embraced all contracts in restraint of trade, or only such as were in unreasonable restraint thereof. There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree. Hence, it was necessary to determine the fact as to the character of the agreement before the case was made out on the part of the Government.

The great stress of the argument on both sides was undoubtedly upon the question as to the proper construction of the statute, for that seemed to admit of the most doubt, but the other question was before the court, was plainly raised, and was necessarily decided. The opinion shows this to be true. At page 341 of the report the opinion contains the following language:

"The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust act applies to

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railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

“Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local.

“To that end the association is formed and a body created which is to adopt rates which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is [561] to put a restraint upon trade or commerce as described in the act. For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.”

The bill of the complainants in that case, while alleging an illegal and unlawful intent on the part of the railroad companies in entering into the agreement, also alleged that by means of the agreement the trade, traffic and commerce in the region of country affected by the agreement had been and were monopolized and restrained, hindered, injured and retarded. These allegations were denied by defendants.

There was thus a clear issue made by the pleadings as to the character of the agreement, whether it was or was not one in restraint of trade.

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court, and was consciously, purposely and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the court did not touch upon the other

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aspect of the case, in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held immaterial, but only for the reason that the agreement did in fact and by its terms restrain trade.

Second. We have assumed that the agreements in the two cases were substantially alike. This the respondents by no means admit, and they assert that there are such material and substantial differences in the provisions of the two instruments as to necessitate a different result in this case from that arrived at in the other.

The expressed purpose of the agreement in this case is, among other things, "to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic." The companies agree that the schedule of rates and fares already duly published and in force and authorized by the companies, parties to the agreement, and filed, as to interstate traffic, with the Interstate Commerce Commission, shall be reaffirmed, and copies of all such schedules are to be filed, with the managers constituted under the agreement, within ten days after it becomes effective. The managers may from time to time recommend changes in the rates, etc., and a failure to observe the recommendations is deemed a violation of the agreement. No company can deviate from these rates except under a resolution of its board of directors, and such resolution can only take effect thirty days after service of a copy thereof on the managers, who, upon receipt thereof, "shall act promptly for the protection of the parties hereto." For a violation of the agreement the offending company forfeits to the association a sum to be determined by the managers thereof, not exceeding five thousand dollars, or more upon the contingency named in the rule.

So far as the establishment of rates and fares is concerned, we do not see any substantial difference between this agreement and the one set forth in the *Trans-Missouri* case. In that case the rates were established by the agreement, and any company violating the schedule of rates as established

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under the agreement was liable to a penalty. A company could withdraw from the association on giving thirty days' notice, but while it continued a member it was bound to charge the rates fixed, under a penalty for not doing so. In [563] this case the companies are bound to charge the rates fixed upon originally in the agreement or subsequently recommended by the board of managers, and the failure to observe their recommendations is deemed a violation of the agreement. The only alternative is the adoption of a resolution by the board of directors of any company providing for a change of rates so far as that company is concerned, and the service of a copy thereof upon the board of managers as already stated. This provision for changing rates by any one company is absent from the other agreement. It is this provision which is referred to by counsel as most material and important, and one which constitutes a material and important distinction between the two agreements. It is said to be designed solely to prevent secret and illegal competition in rates, while at the same time providing for and permitting open competition therein, and that unless it can be regarded as restraining competition so as to restrain trade, there is not even an appearance of restraint of trade in the agreement. It is obvious, however, that if such deviation from rates by any company from those agreed upon, be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that as to that company the agreement might as well be rescinded. This result was never contemplated. In order, therefore, not only to prevent secret competition, but also to prevent any competition whatever among the companies parties to the agreement, the provision is therein made for the prompt action of the board of managers whenever it receives a copy of the resolution adopted by the board of directors of any one company for a change of the rates as established under the agreement. By reason of this provision the board undoubtedly has authority and power to enforce the uniformity of rates as against the offending com-

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pany upon pain of an open, rigorous and relentless war of competition against it on the part of the whole association.

[564] A company desirous of deviating from the rates agreed upon and which its associates desire to maintain is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. Counsel for the association themselves state that the agreement makes it the duty of the managers, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. By this course the competition is open, but none the less sufficient on that account, and the desired and expected result is to be the yielding of the offending company, induced by the war which might otherwise be waged against it by the combined force of all the other parties to the agreement. Under these circumstances the agreement, taken as a whole, prevents, and was evidently intended to prevent, not only secret but any competition. The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient, in the face of this power of the managers to enlist the whole association in a war upon it. This is not all, however, for the agreement further provides that the managers are to have power to organize such joint freight and passenger agencies as they may deem desirable, and if established they are to be so arranged as to give proper representation to each company, and no soliciting or contract-

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ing passenger or freight agency can be maintained by any of the [565] companies, except with the approval of the managers. They are also charged with the duty of securing to each company, party to the agreement, equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done. The natural, direct and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever.

It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. The distinction is unimportant. It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon and receives its equitable proportion of the traffic.

The natural and direct effect of the two agreements is the same, viz., to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases on any such ground. Indeed, counsel for one of the railroad companies on this argument, in speaking of the agreement in the *Trans-Missouri case*, says of it that its terms, while substantially similar to those of the agreement here, were less explicit in making it just and reasonable.

Regarding the two agreements as alike in their main and material features, we are brought to an examination of the question of the constitutionality of the act, construed as it has [566] been in the *Trans-Missouri case*. It is worthy of

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remark that this question was never raised or hinted at upon the argument of that case, although, if the respondents' present contention be sound, it would have furnished a conclusive objection to the enforcement of the act as construed. The fact that not one of the many astute and able counsel for the transportation companies in that case raised an objection of so conclusive a character, if well founded, is strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface and were not then apparent to those counsel.

The point not being raised and the decision of that case having proceeded upon an assumption of the validity of the act under either construction, it can, of course, constitute no authority upon this question. Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat [567] restraining trade and commerce,

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although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; [568] and the sale of a good will of a business with an accompanying agreement not to engage in a similar busi-

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ness was instanced in the *Trans-Missouri* case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins v. United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint [569] of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining inter-

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state rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether the State should itself build them or permit others to do it. The State did not build them, and as their building required, among other things, the appropriation of [570] land, private individuals could not enforce such appropriation without a grant from the State.

The building and operation of a railroad thus required a public franchise. The State would have had no power to

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grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise when granted by the State becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine [571] as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for

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the time be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

The prohibition of such contracts may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution or in any of the amendments to that instrument. *Monongahela Navigation Co. v. United States*, 148 U. S. 312-336; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447-479.

Among these limitations and guarantees counsel refer to those which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

[572] As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer v. Louisiana*, 165 U. S. 578, is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in

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the Fourteenth Amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful, it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie v. United States*, 157 U. S. 160.

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the [573] legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid.

Finally, we are asked to reconsider the question decided in the *Trans-Missouri* case, and to retrace the steps taken

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therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri* case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at length which was certainly commensurate with the importance of the case.

[574] This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct

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opposition to the conclusion arrived at in the *Trans-Missouri case*.

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clear that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be [575] secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former

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decision, or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce. Upon that question it is contended that agreements between railroad companies of the [576] nature of that now before us are promotive instead of in restraint of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from 'the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Com-

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merce, it is said, thus finally becomes restrained by the effects of competition, while, at the same time, otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached by reason of the peculiar nature of railroad property which must be operated and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

[577] The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is a matter of very great uncertainty, depending upon many contingencies and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may and often do continue in existence and engage in their lawful traffic at some profit, although they are competing railroads

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and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible but probable that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do, in regard to the various questions herein discussed, we think it unnecessary to [578] further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri* case.

The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are reversed, and the case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with this opinion.

MR. JUSTICE GRAY, MR. JUSTICE SHIRAS and MR. JUSTICE WHITE dissented.

MR. JUSTICE McKENNA took no part in the decision of the case.

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[578] HOPKINS v. UNITED STATES.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 210. Argued February 28, March 1, 1898.—Decided October 24, 1898.

[171 U. S., 578.]

The Kansas City Live Stock Exchange was an unincorporated volunteer association of men, doing business at its stock yards, situated partly in Kansas City, Missouri, and partly across the line separating Kansas City, Missouri, from Kansas City, Kansas. The business of its members was to receive individually consignments of cattle, hogs, and other live stock from owners of the same, not only in the States of Missouri and Kansas, but also in other States and Territories, and to feed such stock, and to prepare it for the market, to dispose of the same, to receive the proceeds thereof from the purchasers, and to pay the owners their proportion of such proceeds, after deducting charges, expenses and advances. The members were individually in the habit of soliciting consignments from the owners of such stock, and of making them advances thereon. The rules of the association forbade members from buying live stock from a commission merchant in Kansas City, not a member of the exchange. They also fixed the commission for selling such live stock, prohibited the employment of agents to solicit consignments except upon a stipulated salary, and forbade the sending of prepaid telegrams or telephone messages, with information as to the condition of the markets. It was also provided that no member should transact business with any person violating the rules and regulations, or with an expelled or suspended member after notice of such violation. *Held*, that the situation of the yards, partly in Kansas and partly in Missouri, was a fact without any weight; that such business or occupation of the several members of the association was not interstate commerce, within the meaning of the act of July 2, 1890, c. 647, "to protect trade and commerce against unlawful restraints and monopolies;" and that that act does not cover, and was not intended to cover, such kind of agreements.^b

* This suit was begun in the Circuit Court of the United States for the District of Kansas, which court granted the prayers in the bill asking for the dissolution of the Kansas City Live Stock Exchange, and for an injunction restraining defendant from enforcing or acting pursuant to the rules and by-laws of that association (82 Fed., 529). See p. 725. Appeal was taken to the Circuit Court of Appeals, Eighth Circuit, and removed from there to the Supreme Court by writ of certiorari (84 Fed. 1018). See p. 748. Decree reversed by Supreme Court, with directions to dismiss the bill (171 U. S., 578).

^b The foregoing syllabus copyrighted, 1898, by Banks & Bros.

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[43 L. ed., 290.]^a

- [The business of buying and selling live-stock at stock yards in a city by members of a stock exchange as commission merchants is not interstate commerce, although most of the purchases and sales are of live stock sent from other states, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market.]
- [A by-law of the Kansas City Live-Stock Exchange, which regulates the commissions to be charged by members of that association for selling live stock is not in restraint of interstate commerce, or a violation of the act of July 2, 1890, to protect commerce from unlawful restraints.]
- [A commission agent who sells cattle at their place of destination, which are sent from another state to be sold, is not engaged in interstate commerce; nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce.]
- [In order to come within the provisions of the statute, the direct effect of an agreement or combination must be in restraint of trade or commerce among the several states or with foreign nations.]
- [Restrictions on sending prepaid telegrams or telephone messages, made by a by-law of a live-stock exchange, when these restrictions are merely for the regulation of the business of the members, and do not affect the business of the telegraph company, are not void as regulations of interstate commerce.]
- [The business of agents in soliciting consignments of cattle to commission merchants in another state for sale, is not interstate commerce; and a by-law of a stock exchange restricting the number of solicitors to three does not restrain that commerce, or violate the act of Congress.]
- [The fact that a state line runs through stock yards, and that sales may be made of a lot of stock in the yards which may be partly in one state and partly in another, has no effect to make the business of selling stock interstate commerce.]
- [A combination of commission merchants at stock yards, by which they refuse to do business with those who are not members of their association, even if it is illegal, is not subject to the act of Congress of July 2, 1890, to protect trade and commerce, since their business is not interstate commerce.]

THIS suit was commenced by the United States attorney for the District of Kansas, acting under the direction and by

^a The following paragraphs inclosed in brackets are taken from the syllabus to this case in the U. S. Supreme Court Reports, Book 43, p. 290. Copyrighted, 1899, by The Lawyers' Co-Operative Publishing Co.

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the authority of the Attorney General of the United States, against Henry Hopkins and the other defendants, residents of the State of Kansas and members of a voluntary unincorporated association, known and designated as the Kansas City Live Stock Exchange. The purpose of the action is to obtain the dissolution of the exchange, and to perpetually enjoin the members from entering into or from continuing in any combination of a like character.

As a foundation for the relief sought it was alleged in the bill that the members of this association, known as the Kansas City Live Stock Exchange, have adopted articles of association, rules and by-laws which they have agreed to be bound by; that the business of the exchange is carried on and conducted by a board of directors at the Kansas City stock yards, which are situated partly in Kansas City in the State of Missouri and partly in Kansas City in the State of Kansas, the building owned by the stock yards company being located one half of it in the State of Missouri and the other half in the State of Kansas, and half of the defendants have offices and transact business in these stock yards and in that part of the building which is within the State of Kansas, and the other half in that part of the building which is in the State of Missouri; that the Kansas City Stock Yards Company is a corporation owning the stock yards, where the business is done by the members of the exchange; that substantially all the business transacted in the matter of receiving, buying, selling and handling their live stock at Kansas City is carried on by the defendants herein and by the other members of the exchange as commission merchants, and that large numbers of the live stock, consisting [580] of cattle and hogs and sheep bought and sold and handled at the stock yards by the defendants and their fellow members in the exchange, are shipped from the States of Nebraska, Colorado, Texas, Missouri, Iowa, and Kansas, and the Territories of Oklahoma, Arizona and New Mexico; that when this stock is received at the stock yards it is sold by the defendants, members of the exchange, to the various packing houses situated at Kansas City, Missouri, and Kansas City, Kansas, and it is also sold for shipment to the various other markets, particularly Chicago, St. Louis and New York; that vast numbers

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of cattle, hogs and other live stock are received annually at the stock yards and handled by the members of the exchange.

The bill also alleges that large numbers of the live stock sold at the stock yards by the defendants are incumbered by mortgages thereon, executed by their owners in the various States and Territories, which mortgages have been given to various defendants as security for money advanced by them to the different owners to enable them to feed and prepare the cattle for market, and that when the live stock so mortgaged are ready for shipment, they are sent to the defendants who have advanced the money and received the mortgages, and on the sale of the stock the amount of these advances and interest is deducted from the proceeds of the sale of the cattle by the commission merchants owning the mortgages; that ninety per cent of the members of the exchange make such advances, and that the market is largely sustained by means of the money thus advanced to the cattle raisers by the defendants, and that Kansas City is the only place for many miles about, which constitutes an available market for the purchase and sale of live stock from the large territory located in the States and Territories already named; that it is the custom of the owners of the cattle, many of them living in different states, and who consign their stock to the Kansas City stock yards for sale to draw drafts on the commission merchants to whom the live stock is consigned, which the consignors attach to the bill of lading issued by the carrier, and the money on these drafts is advanced by the local banks throughout the western States [581] and Territories. These drafts are paid by the consignees and the proceeds remitted to the various owners through the banks.

The business thus conducted is alleged to be interstate commerce, and it is further alleged that if the person to whom the live stock is consigned at Kansas City is not a member of the exchange, he is not permitted to and cannot sell or dispose of the stock at the Kansas City market, for the reason that the defendants, and all the other commission merchants, members of the exchange, refuse to buy live stock or in any manner negotiate or deal with or buy from a person or commission merchant who is not a member of the exchange, and thus the owner of live stock shipped to the Kansas City mar-

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ket is compelled to re-ship the same to other markets, and by reason of the unlawful combination existing among the defendants and the other members of the exchange the owner is prevented from delivering this stock at the Kansas City stock yards, and the sale of stock is thereby hindered and delayed, entailing extra expense and loss to the shipper, and placing an obstruction and embargo on the marketing of all live stock shipped from the States and Territories to the Kansas City market which is not consigned to the stock yards company or to the defendants, or some of them, members of the stock exchange.

It is alleged that the defendants, as members of the exchange, have adopted certain rules, among them being rules 9 and 16, which are particularly alleged to be in restraint of trade and commerce between the States, and intended to create a monopoly, in contravention of the laws of the United States in that behalf.

Rule 9 provides as follows:

"SECTION 1. Commissions charged by members of this association for selling live stock shall not be less than the following named rates."

Sections 2, 3, 4, 5, 6 and 7 relate to the amounts of such commissions, and it is alleged that in some instances the commissions are greater than had theretofore been paid.

Section 8 permits the members to handle the business of [582] non-resident commission firms when the stock is consigned directly to or from such firm, at half the rates fixed by the rule, provided the non-resident commission firms are established at the markets named in the section.

Section 10 prohibits the employment of any agent, solicitor or employé except upon a stipulated salary not contingent upon the commissions earned, and it provides that not more than three solicitors shall be employed at one time by a commission firm or corporation, resident or non-resident of Kansas City.

Section 11 forbids any member of the exchange from sending or causing to be sent a prepaid telegram or telephone message quoting the markets or giving information as to the condition of the same, under the penalty of a fine as therein

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stated. The rule, however, permits prepaid messages to be sent to shippers quoting actual sales of their stock on the date made; also to parties desiring to make purchases on the market.

Rule 16 provides, in section 1, "That no member of the exchange shall transact business with any persons violating any of the rules or regulations of the exchange, or with an expelled or suspended member after notice of such violation. suspension or expulsion shall have been issued by the secretary or board of directors of the exchange."

It is alleged that the defendants in adopting these rules and in forming the exchange and carrying out the same have violated and are violating the statute of the United States, approved July 2, 1890, c. 647, 26 Stat. 209, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and it is charged that it was the purpose of the defendants, in organizing the exchange and in adopting the rules mentioned, to prevent the shipment or consignment of any live stock to the Kansas City market unless it was shipped or consigned to the Kansas City stock yards and to some one or other of the defendants, members of the exchange, and to compel the shippers of live stock from other States and from the Territories to pay to the defendants the commissions and charges provided for in rule 9, and to prevent such shippers [583] from placing their property on sale at the Kansas City market unless these commissions were paid.

The answer of the defendants admitted their forming the exchange and becoming members thereof, and adopting, among others, the rules specially mentioned in complainants' bill. They denied that the exchange itself engaged in any business whatever, and alleged that it existed simply in order to prescribe rules and provide facilities for the transaction of business by the members thereof, and to govern them by such rules and regulations as have been evolved and sanctioned by the developments of commerce, and which are universally recognized to be just and fair to all concerned.

It was further set up in the answer that each member of the organization was in fact left free to compete in every manner, and by all means recognized to be fair and just, for

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his share of the business which comes to the point at which the members of the organization do business; that in adopting their rules they followed in all substantial respects the provisions which had been made upon the same subject respectively by the exchanges theretofore established at Chicago and East St. Louis, Illinois, and which have been since established at St. Louis, Omaha, Indianapolis, Buffalo, Sioux City and Fort Worth; and that the exchange at no time refused to admit as a member any reputable person who was willing to comply with the conditions of membership and to abide by the rules of the organization.

Various allegations in the bill as to the effect of the organization in precluding any sales or purchases of cattle other than by its members are denied.

The defendants also deny that the exercise of their occupation as commission merchants, doing business as members of the exchange, constitutes or amounts to interstate commerce, within the meaning of the Constitution or laws of the United States. They allege that they have no part in or control over the disposition of the live stock sold by them to others, nor of live stock purchased by them as commission merchants acting for others. They allege that the stock yards company permits any person whatsoever to transact business at its yards who [584] will pay the established charges of that company for its services, and that in point of fact a very large part of the business done at said yards is transacted by persons who are not members of the exchange, and without the interposition of such members. It is also alleged in their answer that they are under no obligations to extend the privileges of the exchange to a person who is not a member thereof, who has violated its rules and been suspended from membership, and who has voluntarily withdrawn therefrom, and announced his purpose to carry on his business as a competitor of the members of such exchange, to the destruction of said organization and its rules and to the injury of his competitors.

It is also set up that defendants cannot be compelled to deal with a non-member of their organization, or a person violating its rules, or with one who has been suspended for such violation, or who has withdrawn therefrom, or who

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has announced his intention to destroy said organization and to compete with the members thereof, and the defendants allege that they cannot be compelled to deal with any person whatsoever, and that they had a right to establish said exchange, and now have the right to maintain the same, and to require the observance of its rules and regulations on the part of their associates, so long as they desire to retain the privileges of membership in the body. They allege that their rules are in harmony with the rules and regulations of commercial exchanges which have existed for more than a hundred years, and which are now to be found in every State almost in the United States, and throughout the world, and that such rules and regulations are in all respects legal and binding. They deny all general and special allegations of illegal agreements, combinations or conspiracies to violate any law of the United States, or of the State of Kansas.

The complainants, in addition to their bill, used several affidavits, the tendency of which was to show that by virtue of the adoption of rules 9 and 16, the members of the exchange refused to deal with one who had violated a rule and had been suspended by reason thereof, and that by reason of this refusal to do business, the member thus suspended was [585] substantially incapacitated from carrying on his business as a commission merchant, and that by this combination defendants, in forming such rule and in adhering to it, have greatly injured the business of such member.

The defendants read counter-affidavits for the purpose of sustaining their answer, which were replied to by the complainants filing affidavits in rebuttal, and upon these affidavits and the pleadings above described an application for an injunction was made to the Circuit Court of the United States for the District of Kansas, First Division. That court, after argument, granted an injunction restraining the defendants from combining by contract, express or implied, so as by their acts, conduct or words to interfere with, hinder or impede others in shipping, trading, selling or buying live stock that is received from the States and Territories at the stock yards in Kansas City, Missouri, and Kansas City, Kansas; also enjoining them from acting under the rules of the exchange known as rules 9 and 16, and from attempting to impose any

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finer or penalties upon members for trading or offering to trade with any person respecting the purchase and sale of any live stock; and also from discriminating in favor of any member of the exchange because of such membership, and especially from discriminating against any person trading at the stock yards, and from refusing, by united or concerted action, or by word, persuasion, threat or by other means, to deal or trade with persons with respect to such live stock who are not members of the association, because they are not members of such association, or in any manner from interfering with the right and freedom of all and any persons trading or desiring to trade in such live stock at the stock yards, the same as if the exchange did not exist. The defendants were also enjoined from agreeing or attempting to limit the right of any person in business at the Kansas City stock yards to employ labor or assistance in soliciting shipments of live stock from other States or Territories, and from enforcing any agreement not to send prepaid telegrams from the stock yards to any other State or Territory.

The District Judge delivered an opinion upon granting the [586] injunction, which will be found reported in 82 Fed. Rep. 529. From the order granting it an appeal was taken by the defendants to the United States Circuit Court of Appeals for the Eighth Circuit, which court certified to this court certain questions under the provisions of section 6 of the act of March 3, 1891, and thereupon a writ of certiorari was issued from this court, and the whole case brought here for decision.

Mr. L. C. Krauthoff for Hopkins and others.

Mr. John S. Miller filed a brief for same.

Mr. Gustavus A. Koerner filed a brief for same.

Mr. Samuel W. Moore for the United States. *Mr. Solicitor General* was on his brief.

MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, c. 647, entitled "An act

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to protect trade and commerce against unlawful restraints and monopolies," commonly spoken of as the Anti-Trust act. 26 Stat. 209.

The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?

[587] That part of the bill which alleges that no one is permitted to do business at the cattle market at Kansas City unless he is a member of this exchange, does not mean that there is any regulation at the stock yards by which one who is not a member of the exchange is prevented from doing business, although ready to pay the established charges of the stock yards company for its services; but it simply means that by reason of the members of the exchange refusing to do business with those who are not members the non-member cannot obtain the facilities of a market for his cattle such as the members of the exchange enjoy. It is unnecessary at present to discuss the question whether there is any illegality in a combination of business men who are members of an exchange not to do business with those who are not members thereof, even if the business done were in regard to interstate commerce. The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with non-members does not come before us for decision.

We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has

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been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner.

As set forth in the record, the main facts are that the defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they had entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction [588] of the business itself. The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stock yards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the

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services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.

Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas [589] City personally, while in the other they are rendered under written instructions from the owner given in another State. This difference in the manner of making the contract for the services cannot alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City, is not engaged in interstate commerce when he makes such sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another State.

The by-laws of the exchange relate to the business of its members who are commission merchants at Kansas City, and some of these by-laws, it is claimed by the Government, are in violation of the act of Congress, because they are in restraint of that business which is in truth interstate commerce. That one of the by-laws which relates to the commissions to be charged for selling the various kinds of stock, is particularly cited as a violation of the act. In connection with that by-law it will be well to examine with some detail the nature of the defendants business.

It is urged that they are active promoters of the business of selling cattle upon consignment from their owners in other States, and that in order to secure the business the defendants send their agents into other States to the owners of the cattle to solicit the business from them; that the defendants also lend money to the cattle owners and take back mortgages

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upon the cattle as security for the loan; that they make advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in another State at the time of the shipment. All these things, it is said, constitute intercourse and traffic between the citizens of different States, and hence the by-law in question operates upon and affects commerce between the States.

The facts stated do not, in our judgment, in any degree alter the nature of the services performed by the defendants, nor do they render that particular by-law void as in restraint [590] of interstate trade or commerce because it provides for a minimum amount of commissions for the sale of the cattle.

Objections are taken to other parts of the by-laws which we will notice hereafter.

Notwithstanding these various matters undertaken by defendants, we must keep our attention upon the real business transacted by them, and in regard to which the section of the by-law complained of is made. The section amounts to an agreement, and it relates to charges made for services performed in selling cattle upon commission at Kansas City. The charges relate to that business alone. In order to obtain it the defendants advance money to the cattle owner; they pay his drafts, and they aid him to keep his cattle and make them fit for the market. All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defendants the business of selling the cattle for him when the owner shall finally determine to sell them. That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it. The competition among the defendants and others who may be engaged in it, to obtain the business, results in their sending outside the city, to cattle owners, to urge them by distinct and various inducements to send their cattle to one of the defendants to sell for them. In this view it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the

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services at that point in selling the cattle for the owner. Thus everything at last centres at the market at Kansas City, and the charges are for services there, and there only, performed.

The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a [591] combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other States are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce.

The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from

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another State. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the [592] facilities given or provided the owner in the course of the movement from the home *situs* of the article to the place and point where it is sold.

The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands v. Manistee River Improvement Co.*, 123 U. S. 288; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 329, 330; *Kentucky & Indiana Bridge Company v. Louisville &c. Railroad*, 37 Fed. Rep. 567.

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely although certainly. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1. Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which

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in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.

[589] It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the States? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one State to an-

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other for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among them- [594] selves by locomotive engineers, firemen or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate. *New York, Lake Erie & Western Railroad v. Pennsylvania*, 158 U. S. 431, 439.

An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct. *Sherlock v. Alling*, 93 U. S. 99-103; *United States v. E. C. Knight Company*, 156 U. S. 1, 16; *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 597; *Transportation Company v. Parkersburg*, 107 U. S. 691; *Ficklen v. Shelby County*, *supra*. Reasonable charges for the use of a facility for the transportation of interstate commerce have heretofore been regarded as valid in this court, even though such charges might necessarily enhance the cost of doing the business. *Packet Company v. St. Louis*, 100 U. S. 423; *Packet Company v. Catlettsburg*, 105 U. S. 559; *Transportation Company v. Parkersburg*, 107 U. S. 691; *Huse v. Glover*, 119 U. S. 543; *Ouachita Packet Company v. Aiken*, 121 U. S. 444; *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92. An agreement among the owners of such facilities, to charge not less than

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a minimum rate for their use, cannot be condemned as illegal under the act of Congress.

The fact that the above cited cases relate to tangible property, the use of which was charged for, does not alter the [595] reasoning upon which the decisions were placed. The charges were held valid because they related to facilities furnished in aid of the commerce and which did not constitute a regulation thereof. Facilities may consist in privileges or conveniences provided and made use of or in services rendered in aid of commerce, as well as in the use of tangible property, and so long as they are facilities and the charges not unreasonable an agreement relating to their amount is not invalid. The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not to render those services unless for a certain charge. The services are no part of the commerce in the cattle.

In *Brown v. Maryland*, 12 Wheat. 419, Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid.

The same view is enforced in *Emert v. Missouri*, 156 U. S. 296.

The right of the cattle owners themselves to sell their own cattle is not affected or touched by the agreement in question, while the privilege of having their cattle sold for them at the market place frequented by defendants, and with the aid of one of them, is a privilege which they are charged for, and which is not annexed to their right to sell their own cattle.

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It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge upon commerce itself might have. In a case [596] like that the remedy would probably be forthcoming. *Transportation Co. v. Parkersburg*, 107 U. S. 691. As was said by Mr. Justice Field in *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 294, 295, "should there be any gross injustice in the rate of tolls fixed, it would not in our system of government, remain long uncorrected."

But whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges. *Transportation Co. v. Parkersburg*, 107 U. S. 691. This case does not involve that question.

If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense to those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not illegal as a restraint thereon.

The facilities or privileges offered by the defendants are apparent and valuable. The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective. Each of these defendants has the right to have the cattle which are consigned to him taken to the cattle yards, where, by virtue of the arrangements made by defendants with the owners of the yards, the cattle are placed in pens, watered and fed, if necessary, and a sale effected at the earliest moment. It is these facilities and

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services which are paid for by a commission on the sale effected by the commission men. [597] If, as is claimed, the commission men sometimes own the cattle they sell, then the rules do not apply, for they relate to charges made for selling cattle upon commission and not at all to sales of cattle by their owners.

Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton v. Missouri*, 91 U. S. 275; *Mobile County v. Kimball*, 102 U. S. 691; *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196; *Hooper v. California*, 155 U. S. 648, 653; *United States v. E. C. Knight Company*, 156 U. S. 1.

But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility.

The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, engaged in interstate commerce? If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or

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[598] bonds are not commodities, and that dealers therein are not engaged in commerce. Whether it is an answer to the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a western State to be sold engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commissions? Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other States, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made.

The theory upon which we think the by-law or agreement regarding commissions is not a violation of the statute operates also in the case of the other provisions of the by-laws. The answer in regard to all objections is, the defendants are not engaged in interstate commerce.

But special weight is attached to the objection raised to section 11 of rule 9 of the by-laws, which provides against sending prepaid telegrams as set forth in the statement of facts herein. It is urged that the purpose of this section is to prevent the sending of prepaid telegrams by the defend-

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ants [599] to their various customers in the different States tributary to the Kansas City market, and that the section is a part of the contract between the members of the exchange, and is clearly an attempt to regulate and restrict the sending of messages by telegraph and telephone between citizens of various States and Territories, and operates upon and directly affects the interstate business of communicating between points in different States by telegraph or telephone.

An agreement among the defendants to abstain from telegraphing in certain circumstances and for certain purposes is so clearly not an attempt to regulate or restrain the general sending of telegrams that it would seem unnecessary to argue the question. An agreement among business men not to send telegrams in regard to their business in certain contingencies, when the agreement is entered into only for the purpose of regulating the business of the individuals, is not a direct attempt to affect the business of the telegraph company, and has no direct effect thereon. Although communication by telegraph may be commerce, and if carried on between different States may be commerce among the several States, yet an agreement or by-law of the nature of the one under consideration is not a burden or a regulation of or a duty laid upon the telegraph company, and was clearly not entered into for the purpose of affecting in the slightest degree the company itself or its transaction of interstate commerce.

The argument of counsel in behalf of the United States, that because none of the States or Territories could enact any law interfering with or abridging the right of persons in Kansas or Missouri to send prepaid telegrams of the nature in question, therefore an agreement to that effect entered into between business men as a means towards the proper transaction of their legitimate business would be void, is, as we think, entirely unsound. The conclusion does not follow from the facts stated. The statute might be illegal as an improper attempt to interfere with the liberty of transacting legitimate business enjoyed by the citizen, while the agreement among business men for the better conduct of their own [600] business, as they think, to refrain from using the telegraph for certain purposes, is a matter purely for their own

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consideration. There is no similarity between the two cases, and the principle existing in the one is wholly absent in the other. The private agreement does not, as we have said, regulate commerce or impose any impediment upon it or tax it. Communication by telegraph is free from any burden so far as this agreement is concerned, and no restrictions are placed on the commerce itself.

The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements.

The next by-law which complainants object to is section 10 of the same rule 9, which prohibits the hiring of a solicitor except upon a stipulated salary not contingent upon commissions earned, and which provides that no more than three solicitors shall be employed at one time by a commission firm or corporation.

The claim is that these solicitors are engaged in interstate commerce, and that such commerce must be free from any state legislation and free from the control or restraint by any person or combination of persons. They also object that the rule is an unlawful inhibition upon the privilege possessed by each person under the Constitution to make lawful contracts in the furtherance of his business, and they allege that in this respect these members have surrendered their dominion over their own business and permitted the exchange to establish a species of regency, and that the by-law in regard to the employment of solicitors is one which directly affects interstate commerce.

McCall v. California, 136 U. S. 104, is cited for the proposition that the solicitors employed by these defendants are engaged in interstate commerce. In that case the railroad company was itself engaged in such commerce, and its agent in California was taxed by reason of his business in soliciting [601] for his company that which was interstate commerce. The fact that he did not sell tickets or receive or pay out money on account of it was not regarded as material. His principal was a common carrier, engaged in interstate com-

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merce, and he was engaged in that commerce because he was soliciting for the transportation of passengers by that company through the different States in which the railroad ran from the State of California. In the case before us the defendants are not employed in interstate commerce but are simply engaged in the performance of duties or services relating to stock upon its arrival at Kansas City. We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and until the arrival of the stock at that point and the delivery by the transportation company no duties of an interstate-commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce. Not being engaged in interstate commerce, the agreement of the defendants through the by-law in question, restricting the number of solicitors to three, does not restrain that commerce, and does not therefore violate the act of Congress under discussion.

The position of the solicitors is entirely different from that of drummers who are travelling through the several States for the purpose of getting orders for the purchase of property. It was said in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, that the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce.

But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to [602] market for sale they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them and account to them for the proceeds thereof. Unlike the drummer who contracts in one State for the sale of goods which are in an-

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other, and which are to be thereafter delivered in the State in which the contract is made, the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business.

Hooper v. California, 155 U. S. 648, is another illustration of the meaning of the term "commerce," as used in the Constitution of the United States. In that case, contracts of marine insurance are stated not to appertain to interstate commerce, and cases are cited upon the nature of the contract of insurance generally at page 653 of the opinion.

It is also to be remarked that the effect of the agreement as to the number of solicitors to be employed by defendants can only be remote and indirect upon interstate commerce. The number of solicitors employed has no direct effect upon the number of cattle transported from State to State. The solicitors do not solicit transportation of the cattle. They are not in the interest of the transportation company, and the transportation is an incident only. They solicit a consignment of cattle to their principals, so that the latter may sell them on commission and thus transact their local business. The transportation would take place any way and the cattle be consigned for sale by some one of the defendants or by others engaged in the business. It is not a matter of transportation but one of agreement as to who shall render the services of selling the cattle for their owner at the place of destination.

We say nothing against the constitutional right of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant States and Territories as many solicitors as the business of each will warrant. This [603] original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a

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way which they may think the most conducive to their own interests. What a State may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing.

The liberty of contract as referred to in *Allgeyer v. Louisiana*, 165 U. S. 578, is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited.

We agree with the court below in thinking there is not the slightest materiality in the fact that the state line runs through the stock yards in question, resulting in some of the pens in which the stock may be confined being partly in the State of Kansas and partly in the State of Missouri, and that sales may be made of a lot of stock which may be at the time partly in one State and partly in the other. The erection of the building and the putting up of the stock pens upon the ground through which the state line ran were matters of no moment so far as any question of interstate commerce is concerned. The character of the business done is not in the least altered by these immaterial and incidental facts.

It follows from what has been said that the complainants have failed to show the defendants guilty of any violations of the act of Congress, because it does not appear that the defendants are engaged in interstate commerce, or that any agreements or contracts made by them and relating to the conduct of their business are in restraint of any such commerce.

Whether they refused to transact business which is not interstate commerce, except with those who are members of the exchange, and whether such refusal is justifiable or not, [604] are questions not open for discussion here. As defendants' actions or agreements are not a violation of the act of Congress, the complainants have failed in their case, and the order for the injunction must be

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Reversed and the case remitted to the Circuit Court of the United States for the District of Kansas, First Division, with directions to dismiss the bill with costs.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE MCKENNA took no part in the decision of this case.

[604] ANDERSON v. UNITED STATES.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 181. Argued February 25, 28, 1898.—Decided October 24, 1898.

[171 U. S., 604.]

The Traders' Live Stock Exchange was an unincorporated association in Kansas City, whose members bore much the same relation to it, and through it carried on much the same business as that carried on by the members of the Kansas City Live Stock Exchange, considered and passed upon in *Hopkins v. United States*, just decided. The main difference was, that the members of the Traders' Exchange, defendants in the present proceedings, were themselves purchasers of cattle on the market, while the defendants in the former case were commission merchants who sold cattle upon commission as a compensation for their service. The articles of association of the Traders' Exchange contained the following preamble: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization." The rules objected to in the bill in this case were the following: "Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange. Rule 11. [605] When there are two or more parties trading together as partners, they shall each and all of them be members of this

* Certified to the Supreme Court by the Circuit Court of Appeals, Eighth Circuit (82 Fed., 998). Memorandum decision. See p. 742. Decision in the Circuit Court not reported.

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exchange. Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange. Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party." *Held:*

- (1) That this court is not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act;
- (2) That, following the preceding case, in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations;
- (3) That where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object;
- (4) That the rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and that for such purpose they are reasonable and fair, and that they can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.^a

[43 L. ed., 300.]^b

[An agreement among persons engaged in the common business, as yard trader, of buying at a city stock-yard cattle which came from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, or buy cattle from

^a The foregoing syllabus copyrighted, 1898, by Banks & Bros.

^b The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 43, p. 300. Copyrighted, 1899, by The Lawyers' Co-Operative Publishing Co.

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those who also sell to yard traders who are not members of the association, is not in violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies].

[A rule of a live-stock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange.]

[Rules to enforce the purpose and object of such exchange, if reasonable and fair, cannot, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890.]

THIS suit is somewhat similar to the *Hopkins suit*, just decided, and was brought by the United States against the defendants named, who were citizens and residents of the Western Division of the Western District of Missouri and members of a voluntary unincorporated association known and designated as the Traders' Live Stock Exchange, the suit being brought for the purpose of obtaining a decree dissolving the exchange and enjoining the members thereof from entering into or continuing any sort of combination to deprive any people engaged in shipping, selling, buying and handling [606] live stock (received from other States and from the Territories, intended to be sold at the Kansas City market), of free access to the markets at Kansas City, and to the same facilities afforded by the Kansas City stock yards, to defendants and their associate members of the Traders' Live Stock Exchange.

The bill was filed under the direction of the Attorney General of the United States by the United States District Attorney for the Western District of Missouri. It alleged in substance that the exchange was governed by a board of eight directors, who carried on the business thereof with the consent and approbation of the defendants, they personally being members of the exchange. It then made the same allegations in relation to the stock yards being partly in Kansas City, Kansas, and partly in Kansas City, Missouri, that are contained in the bill in the *Hopkins case*, just decided, and also as to the sales of herds or droves of cattle which were at the time of the sale partly in one State and

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partly in another. It is further alleged that the Kansas City stock yards are a public market, and, next to the market at Chicago in the State of Illinois, the largest live stock market in the world, and vast numbers of cattle, hogs and other live stock are received annually at the market, shipped from various States and from the Territories, and are sold at the market to buyers who reside in other States and Territories, and who reship the stock; that the stock is shipped to the market under contracts by which the shipper is permitted to unload the stock at the Kansas City stock yards, rest, water and feed the same, and is accorded the privilege of selling the stock on the Kansas City market if the prices prevailing at the time justify the sale, and many head of such stock are so sold; that prior to the month of March, 1897, as alleged, the defendants herein were engaged as speculators at the Kansas City stock yards, and were buying upon the market and reselling upon the same market and reshipping to other markets in other States the cattle so received at the Kansas City stock yards; that all the live stock shipped to and received at these stock yards is consigned to commission merchants, who take charge of the stock when it is received, and who sell the same [607] to packing houses located at Kansas City, Missouri, and Kansas City in the State of Kansas, and they sell large numbers of cattle to the defendants herein.

The bill then alleges that the defendants "have unlawfully entered into a contract, combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, in this, to wit, that they have unlawfully agreed, contracted, combined and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market at the Kansas City stock yards as aforesaid; that the commission, firm, person, partnership or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to and cannot sell or dispose of said cattle at the Kansas City market as aforesaid to any buyer or speculator at the Kansas City stock yards unless said buyer or speculator is a member of the Traders' Live Stock Exchange, and these defendants (and each of them), unlawfully and oppressively refuse to purchase cattle, or in

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any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle from any speculator at the said Kansas City stock yards who is not a member of the said Traders' Live Stock Exchange; that by and through the unlawful agreement, combination and conspiracy of these defendants the business and traffic in cattle at the said Kansas City stock yards is interfered with, hindered and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the States and Territories aforesaid to the Kansas City stock yards."

It is further alleged that, acting in pursuance of the unlawful combination above described, the board of directors of the exchange have imposed fines upon certain members of the exchange "who had traded with persons, speculators upon the markets, who were not members of the said live stock exchange, and within three months last past have imposed fines upon members of said live stock exchange who have traded with commission firms at said Kansas City stock yards [608] which said commission firms had bought from, and sold cattle to speculators upon said market who were not members of the said live stock exchange."

It was further stated in the bill that in carrying out the purposes and aims of this exchange and by the conduct of its members engaged in this alleged combination, conspiracy and confederation, they were acting in violation of the laws of the United States, and particularly in violation of section 1 of the act of Congress, approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, and in the prosecution of this unlawful combination they had agreed to hinder and delay the business of buying and selling cattle at the market named and had confederated together in restraint of trade and commerce between the States, and that the object of the defendants in organizing the exchange was to prevent the sale by any commission merchant at the Kansas City stock yards of any cattle to any person who might be a buyer and speculator upon the market who is not a member of the exchange.

Accompanying this bill were several affidavits of indi-

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viduals not members of the exchange, but who were traders or speculators at the stock yards, and those persons said that they were acquainted with the association in question and with the officers and members, and that they did everything in their power to prevent other persons who were not members from trading at the stock yards, and a number of instances were given in which the affiants who were not members of the exchange were endeavoring to do business with commission merchants and others at the exchange in question, when the affiants were notified that they could not continue in business unless they became members of the association, and where partnerships were engaged in business where one partner was a member of the association, the partner who was a member was notified that he could not continue in the partnership business with the other unless such other also became a member; that they had attempted to buy cattle from a great many commission firms and from their salesmen at these stock yards, [609] but as soon as they went into the yards where the cattle were that were consigned to commission firms and attempted to purchase them, some of the defendants would appear, call the salesman aside, and, after having a conversation with such salesman, the latter would invariably return to affiant and say that he could not price cattle to the affiant or sell the same to him, as he had been warned by members of the exchange not to do so; that the Traders' Live Stock Exchange would not permit other traders and speculators upon the market, and that the exchange does not permit commission firms at the stock yards to sell cattle consigned to them to any trader or speculator upon the market who is not a member of the exchange, and that commission firms had been notified by the officers of the stock exchange not to sell to speculators on the market who were not members of the Live Stock Exchange, and where commission firms sold cattle to traders and speculators upon the market who were not members of the exchange, the association and members thereof would boycott the commission firm making such sales, and refuse to purchase any cattle from them, and refuse to go into the lots and look at cattle which had been consigned to them.

Upon the bill and affidavits application was made to the Circuit Court for the Western Division of the Western Dis-

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trict of Missouri for an injunction as prayed for in the bill, in opposition to which application various affidavits were read on the part of the defendants, and copies of the articles of association and by-laws of the exchange were attached to the affidavit of the president of the exchange and read on the motion.

Among other affidavits was that of the general superintendent of the stock yards company, who said that he had known the organization, the Traders' Live Stock Exchange, since its formation, and that it had been a benefit to the live stock market at Kansas City by furnishing constant buyers for cattle shipped to the market, no matter how large the receipts for any one day or series of days might be, and also by raising the standard of business integrity among its members, because it required every member to comply with his business promises [610] and verbal agreements; that no embargo was placed upon any one purchasing or desiring to purchase cattle at the yards, but a free and open market was offered to all buyers and sellers; that the members of the organization were engaged in the business of buying and selling cattle on the market, and were competitors among and against each other; that their organization did not restrain or interfere with interstate or local commerce, and the members did not monopolize or attempt to monopolize the business of buying and selling cattle at Kansas City, nor did the organization in any manner tend to limit or decrease the number of cattle marketed at Kansas City, but that it had the contrary effect; that about eighty-five per cent of the total receipts for the years 1895, 1896 and 1897 at the Kansas City market of cattle had been billed to the Kansas City market alone for purposes of sale there.

Other affidavits were presented to the same effect. Also the affidavit of the president of the exchange. The president denied all allegations in relation to conspiracies to prevent other persons than members of the exchange from buying and selling cattle upon the Kansas City market, and on the contrary alleged that in buying cattle the defendants were in competition with each other, with the representative buyers of all the packing houses, with the representatives of the various commission merchants who buy constantly on orders from a

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distance, and with others who buy on orders on their own account, none of whom are members of the exchange, and that with these various classes of buyers the defendants constantly deal, and that in selling cattle they compete with each other and with shippers and commission merchants offering stock for sale on the market; that the business in which these defendants are engaged is that of buying and selling cattle known as "stockers and feeders;" that the business is purely local to that market; that the defendants do not deal in quarantine cattle subject to government inspection or cattle shipped through to other markets, with or without the privilege of the Kansas City market, nor in fat cattle sold on the local market shipped to other States or to foreign countries; that except in rare instances both purchases and sales made [611] by the defendants are made from and to persons not members of the exchange, and that in the judgment of the president about ninety-nine per cent of the transactions by the defendants are with persons not members of the exchange.

A copy of the articles of association is annexed to the affidavit, which contains the following preamble:

"We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization."

Rules 10, 11, 12 and 13 are as follows:

"Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange.

"Rule 11. When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange.

"Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange.

"Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party."

These are the rules which are specially obnoxious to the complaints, and are alleged to be in their effect in violation of the Federal statute above mentioned.

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Mr. R. E. Ball for Anderson and others. *Mr. I. P. Ryland* and *Mr. John L. Peak* were on his brief.

Mr. John R. Walker for the United States. *Mr. Solicitor General* was on his brief.

[612] MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

There is really no dispute in regard to the facts in the case. Although the bill contains various allegations in regard to conspiracies, agreements and combinations in restraint of trade and in violation of the Federal statute, yet there is no evidence of any act on the part of the defendants preventing access to the yards or preventing purchases and sales of cattle by any one, other than as such sales may be prevented by the mere refusal on the part of the defendants as "yard traders" to do business with those who are also yard traders, but are not members of the exchange, or with commission merchants where such commission merchants themselves do business with yard traders who are not members of the exchange. In other words, there is no evidence and really no charge against the defendants that they have done anything other than to form this exchange and adopt and enforce the rules mentioned above, and the question is whether by their adoption and by peacefully carrying them out without threats and without violence, but by the mere refusal to do business with those who will not respect their rules, there is a violation of the Federal statute.

This case differs from that of *Hopkins v. United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins case* were only commission merchants who sold the cattle upon commission as a compensation for their services.

Counsel for the Government assert that any agreement or combination among buyers of cattle coming from other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce.

The facts first set forth in the complainants' bill upon which to base the claim that the business of defendants is in-

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terstate commerce, we have already decided in the *Hopkins case* to be immaterial. The particular situation of the yards, partly in Kansas and partly in Missouri, we there held was a fact without any weight, and one which did not make business inter- [613] state commerce which otherwise would not partake of that character.

There remain in the bill of the complainants the allegations that the cattle come from various States and are placed on sale at these stock yards which form the only available market for many miles around, and that they are sold by the commission merchants and are bought in large numbers by the defendants who have entered into what the complainants allege to be a contract, combination and conspiracy in restraint of trade and commerce among the several States, which contract, etc., it is alleged is carried out by defendants unlawfully and oppressively refusing to purchase cattle from a commission merchant who sells or purchases cattle from any speculator (yard trader) who is not a member of the exchange; and it is further alleged that by these means the traffic in cattle at the Kansas City stock yards is interfered with, hindered and restrained, and extra expense and loss to the owner incurred, and that thereby the defendants have placed an obstruction and embargo on the marketing of cattle shipped from other States. All these results are alleged to flow from the agreement among the defendants as contained in the by-laws of their association, particularly those numbered ten, eleven, twelve and thirteen, copies of which are set forth in the statement of facts herein.

There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to.

In regard to rule 10, the question is whether, without a

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violation of the act of Congress, persons who are engaged in the common business as yard traders of buying cattle at the [614] Kansas City stock yards, which come from different States, may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor will they buy cattle from those who also sell to yard traders who are not members of the association.

It will be remembered that the association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader can become a member of the association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction.

The defendants are engaged in buying what are called "stockers and feeders;" being cattle not intended for any other market, and the demand for which is purely local. They have arrived at their final destination when offered for sale, and there is free and full competition for their purchase between all the members of the exchange, as well as between them and all buyers not members thereof, who are not also yard traders. With the latter the defendants will not compete, nor will they buy of the commission men if the latter continue to sell cattle to such yard traders.

Have the defendants the right to agree to conduct their own private business in this way?

Whether there is any violation of the act of Congress by the adoption and enforcement of the other rules of the association, above referred to, will be considered hereafter.

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It is first contended on the part of the appellants that they [615] are not engaged in interstate commerce or trade, and that therefore their agreement is not a violation of the act. They urge that the cattle, by being taken from the cars in which they were transported and placed in the various pens hired by commission merchants at the cattle yards of Kansas City, and there set up for sale, have thereby been commingled with the general mass of other property in the State, and that their interstate commercial character has ceased within the decisions of this court in *Brown v. Houston*, 114 U. S. 622, and *Pittsburg and Southern Coal Co. v. Bates*, 156 U. S. 577.

On the other hand, it is answered that the cases cited involved nothing but the general power of the State to tax all property found within its limits, by virtue of general laws providing for such taxation, where no tax is levied upon the article or discrimination made against it by reason of the fact that it has come from another State, and it is maintained that the agreement in question acts directly upon the subject of interstate commerce and adds a restraint to it which is unlawful under the provisions of the statute.

In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

It has already been stated in the *Hopkins case*, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged,

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such agreement will be upheld as [616] not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith v. Alabama*, 124 U. S. 465, 473; "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid.

From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary.

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and the [617] penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble. In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce. The agreement now under discussion differs radically from those of *United States v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 482; *United States v. Coal Dealers Association of California*, 85 Fed. Rep. 252, and *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration, that they form no basis for its decision. This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of [618] cattle for sale is, therefore,

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furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof.

The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. If while enforcing the rules those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced, and to that extent the number of competitors limited, yet all this is done, not with the intent or purpose of affecting in the slightest degree interstate trade or commerce, and such trade or commerce can be affected thereby only most remotely and indirectly, and if, for the purpose of compelling this membership, the association refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. The agreement relates to the action of the associates themselves, and it places in effect no tax upon any instrument or subject of commerce; it exacts no license from parties engaged in the commercial pursuits, and prescribes no condition in accordance with which commerce in particular articles or between particular places is required to be conducted. *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 473; *Pittsburg and Southern Coal Company v. Louisiana*, 156 U. S. 590, 598.

If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible effect of such a course [619] of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account.

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The agreement lacks, too, every ingredient of a monopoly. Every one can become a member of the association, and the natural desire of each member to do as much business as he could would not be in the least diminished by reason of membership, while the business done would still be the individual and private business of each member, and each would be in direct and immediate competition with each and all of the other members. If all engaged in the business were to become members of the association, yet, as the association itself does no business, it can and does monopolize none. The amount and value of interstate trade is not at all directly affected by such membership; the competition among the members and with others who are seeking purchasers would be as large as it would otherwise have been, and the only result of the agreement would be that no yard traders would remain who were not members of the association. It has no tendency, so far as can be gathered from its object or from the language of its rules and regulations, to limit the extent of the demand for cattle or to limit the number of cattle marketed or to limit or reduce their price or to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market. While in case all the yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct, necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. A claim that such refusal may thereby lessen the number of actual traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid.

This case is unlike that of *Hopkins v. Oxley Stave Company*, 83 Fed. Rep. 912, to which our attention has been called. The case cited was decided without reference to the act of Con- [620] gress upon which alone the case at bar is prosecuted, and the agreement was held void at common law as a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its

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own judgment. It was also said that the fact could not be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seemed to the court to be one of great utility. No question as to interstate commerce arose and none was decided.

From what has already been said regarding rule 10, it would seem to follow that the other rules (11, 12 and 13) are of equal validity as rule 10, and for the same reasons. The rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and we think that for such purpose they are reasonable and fair. They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.

We are of opinion therefore that the order in this case should be reversed and the case remanded to the Circuit Court of the United States for the Western Division of the Western District of Missouri with directions to dismiss the complainants' bill with costs.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE McKENNA took no part in the decision of this case.

[479] CRAVENS v. CARTER-CRUME CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1899.)

[92 Fed., 479.]

TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.—Error cannot be assigned upon the action of the court in receiving documents in evidence, where no ground for their exclusion is stated in the objection made.^a

MONOPOLIES—COMBINATION TO RESTRICT PRODUCTION—VALIDITY OF CONTRACTS.—At a convention of manufacturers of wooden ware in which 80 per cent. of the production of the country was represented, a combination [480] was formed for the purpose of restricting the production of wooden dishes throughout the country, and keeping up the

^a Syllabus and statement copyrighted, 1899, by West Publishing Co.

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price thereof. To this end it was expected and intended that all the factories would be brought under the control of a central organization, which was to regulate the prices. The articles to which the combination related were such as are in common use. *Held*, that a contract made in pursuance of such combination, by which a manufacturer was guaranteed a certain sum as dividends on his stock in the central company, in consideration of the closing of his factory for a year, was contrary to public policy, and therefore unlawful, and would not be enforced by the courts.

Error to the Circuit Court of the United States for the Southern District of Ohio.

Charles Cravens, plaintiff in error, a citizen of Indiana, doing business at Paducah, Ky., under the name of Charles Cravens & Co., brought this action against the Carter-Crume Company, a West Virginia corporation, the National Mercantile Company, an Ohio corporation, and the Crume & Sefton Manufacturing Company, another West Virginia corporation, to recover the sum of \$9,000, which he claimed had inured to him under the guaranty of the Carter-Crume Company that the dividends upon certain stock, sold to him by contract between the National Mercantile Company and himself, should amount to the sum of \$9,000 for the year then next ensuing. The National Mercantile Company demurred to the petition, and, the demurrer being sustained, the case was dismissed as to that company. The Crume & Sefton Manufacturing Company dropped out of the case by consent of parties. The Carter-Crume Company answered the petition, and the plaintiff replied. As no question arose upon the pleadings, and none of the errors assigned has relation thereto, it is unnecessary to give any detailed statement thereof. The only questions involved are such as arose upon the trial of the case, and they are based entirely upon the testimony. The facts as they appeared upon the trial were substantially these:

The plaintiff, Cravens, was, and for some time had been, engaged in manufacturing wooden dishes and dish machines at Paducah, Ky., at the time of the making of the contract of guaranty, which was on the 28th day of August, 1896. At that time there were also a number of parties engaged in the same kind of business at various other places scattered throughout the United States, principally in the northern portion thereof. One of these was the Carter-Crume Company, which, by its charter, was required to establish its principal office at Niagara Falls, N. Y. The president and secretary kept their offices at that place, but the vice-president and manager had offices at Dayton, Ohio. Another of such manufacturers was the Crume & Sefton Manufacturing Company, the locality of whose principal office is not stated, but it appears to have been doing business at Dayton, Ohio. The National Mercantile Company was an Ohio corporation, having its principal office at Dayton, the majority of the stock in which was owned by parties largely interested in the other two companies just mentioned. William E. Crume, of the Carter-Crume Company, and John C. Crume, of the Crume & Sefton Company, were charter members thereof. William E. Crume was the secretary, and appears to have been largely influential in the direction of the management of the National Mercantile Company. He was also vice president of the Carter-Crume Company, and managed its affairs at Dayton, Ohio. The business for which the National Mercantile Company was incor-

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porated is thus set forth in the third article of incorporation: "Said corporation is formed for the purpose of buying and selling and dealing in wooden ware and grocers' novelties." It was not a manufacturer. This corporation appears to have been formed for the purpose of creating a common controlling head, into connection with which the various manufacturers of wooden dishes throughout the country should, as far as possible, be brought, whereby the output and sale of their manufactures should be controlled in respect to quantity and price. The plaintiff, Cravens, after some preliminary negotiations with the parties representing the corporations doing business at Dayton, as above stated, went there on the date above mentioned, August 28, 1896, for the purpose of meeting and conferring with those parties and others [481] interested in the manufacture of wooden dishes and dish machines. A considerable number of such persons from different places in the country, representing about 80 per cent. of the entire output of wooden dishes in the country, convened there that day, and a meeting was held, which the plaintiff attended, for the purpose of effecting a combination whereby the output of their goods should be restricted and prices maintained. This plan involved the making of contracts by the manufacturers with the National Mercantile Company of a kind similar to that hereinafter stated between the plaintiff and the National Mercantile Company. Having taken some of the stock, the plaintiff was made a director of that company on that day.

The following is an extract from his testimony, as found in the bill of exceptions: "Q. Mr. Cravens, you were contemplating that deal before that? A. I was contemplating a deal with the National Mercantile Company. Q. You went down to Dayton for the purpose of getting into that deal? A. I didn't know. I was asked to go and attend a meeting. Q. In what way? A. A meeting of the different manufacturers. Q. How much of the output of the country was represented at that time? A. I could not say. Q. Have you no idea? A. (No response.) Q. What was the object of the meeting, as stated to you? A. Mr. Crume had been to see me; wanted me to go into the National Mercantile Company. He wanted me to put my factory in. My factory would represent so much stock. My dividend, he said, would amount to six thousand dollars or more. I refused to do it. I told him that I would if Carter-Crume Company would guaranty me nine thousand dollars. I would close my factory, and not run it at all. Q. You were made director of the National Mercantile Company? A. Yes, sir. Q. What was the object of that company, as you understood as a director? A. Well, I saw that they were then working to get all these factories in line. Q. For what purpose? A. They wanted to close my factory. Q. For what purpose? A. To get the factories all in line. Q. As you understand that, as a director of the company? A. They were to maintain prices. Q. And anything else, sir? A. What they wanted to do was to control the business at that time. Q. And that was the object of that meeting, was it not? A. That was the object of that meeting; yes, sir. Q. And you were director of the company? A. I was director of the company. I will state, though, before I went into that company I had the guaranty—I had Mr. Crume's word that Carter-Crume Company would guaranty me nine thousand dollars a year, if I did this. Q. You knew what you were going into? You made the proposition that, if they would guaranty this nine thousand dollars, you would close your factory? A. I was leasing them my machinery. Q. Didn't you know what the Mercantile Company was buying your factory for,—what you were going into it for? A. To get rid of my machinery; to get this nine thousand dollars. Q. Didn't Mr. Crume tell you what he wanted to do? A. That he wanted to get me in line. Q. What for? A. To maintain prices."

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On the occasion of that meeting, the following contracts were entered into between the plaintiff and the other parties named therein:

"CONTRACT.

"This agreement, entered into by and between the National Mercantile Company, a corporation by virtue of and under the laws of Ohio, with office at Dayton, Ohio, their successors or assigns, party of the first part, and Charles Cravens & Co., a co-partnership, of Paducah, Ky., parties of the second part, witnesseth:

"(1) That party of the first part being desirous of leasing all the wood-dish machines now owned or controlled by the party of the second part, and the party of the second part being desirous of renting said machines to the party of the first part, it is hereby agreed that, for the sum of one dollar (\$1.00) and other valuable considerations, the party of the second part agrees to lease, and does hereby lease, to the party of the first part, all the wood-dish machines now owned or controlled by it, and all the wood-dish machines that may, during the continuance of this contract, come into the possession or control of the party of the second part.

"(2) It is also agreed and understood that the said machines shall remain [482] in the possession and control of the party of the second part, and it agrees to operate and keep in repair the said machines, and proceed to make wood dishes for the party of the first part, on the following terms and conditions:

"(3) The wood dishes shall be made of gum and maple wood, all light in color, all first quality, and satisfactory to the general trade, and they shall be securely packed in good, substantial crates, containing 250 or 500 dishes, as may be, from time to time, specified by first party. If packed in crates, the crate heads shall be planed, branded, and stenciled as instructed by the party of the first part.

"(4) The party of the first part agrees to take wood dishes per year during the continuance of this contract, which shall be distributed as near as may be to dishes daily.

"(5) It is hereby agreed that the price to be paid for said wood dishes shall be: No. 1-2's, 65c.; No. 1's, 65c.; No. 2's, 75c.; No. 3's, 85c.; No. 5's, \$1.05,—per thousand, f. o. b. cars at factory point, and shipped as per instructions from party of the first part; shipping bill, together with invoice, to be promptly mailed to party of the first part. Terms: Cash ten days after date of bill of lading.

"(6) In consideration of the large quantity of wood dishes purchased by the party of the first part, the party of the second part agrees that it will not make for or sell wood dishes, directly or indirectly, to any other person, firm, or corporation.

"(7) The dishes purchased by, and to be made for, the party of the first part shall not become the property of the party of the first part until they are loaded on board cars or vessel, and receipted for by the transportation company.

"(8) It is further agreed that the party of the second part shall make a weekly factory report to the party of the first part; said report to be made out on the Monday following the close of each week, and mailed to the office of the first party. This report to contain a record of the quantity of each size dish made and shipped for the week, and quantity on hand at the end of each week. These reports to be made out on report blanks furnished by the party of the first part.

"(9) The party of the second part agrees to furnish wood dishes additionally in proportion to above-named quantity, at the same prices, and upon the conditions, herein named, if called to do so by the party of the first part.

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"(10) Where the words 'wood dishes' are used herein, it is understood that wire-end wood dishes are meant.

"August 28, 1895.

"THE NATIONAL MERCANTILE COMPANY,

"By W. E. CRUME, *Sec'y.*

"By CHARLES CRAVENS & Co."

"SUPPLEMENTARY AGREEMENT.

"Between the National Mercantile Company of Dayton, Ohio, party of the first part, and Charles Cravens & Co., party of the second part, to be attached to and become a part of an original agreement between the above parties, dated August 28, 1895:

"(1) Party of the second part, being desirous of obtaining forty-nine shares of the capital stock of the National Mercantile Company, hereby agrees to pay for the same five hundred dollars (\$500), to be paid for in wood dishes shipped to the order of the party of the first part, all to be of first quality, and at the prices named in the original agreement of August 28, 1895.

"(2) The value of said dishes to be placed to the credit of the second party on the books of the company, representing its shares in the capital stock of the company.

"(3) Said quantity of dishes in value to be furnished by the party of the second part before the party of the first part shall be required to pay cash for dishes, as specified in section 5 of the original agreement.

"(4) It is agreed, upon the expiration of this agreement or any renewal thereof, that the share of assets of the company, as represented by the shares of stock held by the party of the second part, shall be paid over to the party of the second part.

[493] "(5) This agreement to remain in force and effect during the continuance of the contract between the parties hereto of even date herewith.

"THE NATIONAL MERCANTILE COMPANY,

"By W. E. CRUME, *Secretary.*

"By CHARLES CRAVENS & Co.

"It is hereby agreed, by the parties hereto, that the Carter-Crume Company, a corporation under the laws of West Virginia, agrees to assume, and does hereby assume, to make the above quantity of wood dishes at the prices and upon the conditions above named.

"Dated August 28, 1895.

"THE CARTER-CRUME COMPANY,

"By W. E. CRUME, *Vice President.*

"By CHARLES CRAVENS & Co."

"Memorandum of agreement made this 28th day of August, 1895, by and between the Carter-Crume Company, a corporation organized under the laws of the state of West Virginia, party of the first part, and Charles Cravens & Co., of Paducah, Kentucky, parties of the second part, referring to a contract and supplementary agreement made this day between the National Mercantile Company, Dayton, Ohio, and Charles Cravens & Co., of Paducah, Kentucky, parties of the second part: Inasmuch as, under the agreement above referred to, Charles Cravens & Co. have become owners of fifty shares of stock in the National Mercantile Company, parties of the first part guaranty to parties of the second part that the dividends paid by the National Mercantile Company to Charles Cravens & Co., on said fifty shares of stock, shall amount to seven hundred and fifty dollars

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(\$750) per month, or a total of nine thousand (\$9,000) dollars for the year, ending one year from to-day, or, in the event of such dividends not amounting to such amount, then parties of the first part agree to pay to parties of the second part, on or before one year from to-day, the difference in money between the total amount of dividends paid on said fifty shares of stock and the sum of nine thousand (\$9,000); it also being a condition of this agreement that party of the second part is not to manufacture the dishes for the National Mercantile Company, as specified in their contract of this date, referred to above, but such dishes are to be made in fulfillment of said contract by the party of the first part. Party of the first part to receive all money paid by the National Mercantile Company for such dishes.

"Signed August 28, 1895.

"THE CARTER-CRUME COMPANY,
"By W. E. CRUME, *Vice President*.
"By CHARLES CRAVENS & Co."

Typewritten minutes of the proceedings at a meeting of the directors of the National Mercantile Company attended by the plaintiff on that day, which a witness testified were taken at the time, were offered in evidence by defendant, and, against objection on behalf of the plaintiff, received, which, among other things, stated that it was resolved: "That it is the policy of this company to hold the price on machine-made wire-end wood butter dishes firm at \$1.00 basis, and that the secretary be, and is hereby, instructed to use his best endeavor to stop all attempts to manufacture dishes, or the making of machines for the manufacture of wood dishes, and to use coercive measures, if necessary, to accomplish this result." These minutes had never been entered in any record book of the company.

The plaintiff executed his part of the above agreements, and in due time demanded the \$9,000, no part of which had been, or was at any time, paid to him. Numerous other contracts between manufacturers of wooden dishes and the National Mercantile Company or the Carter-Crume Company of a similar character, made about the same time, were offered in evidence, and received, against the objection of counsel for plaintiff, who, however, assigned no reasons or grounds for his objection. Some other incidental facts were shown, but the foregoing is the substance of the case as it appeared upon the trial. The trial judge held, at the conclusion of the evidence, that the contracts between the plaintiff, the National Mercantile Company, and the Carter-Crume Company, were not, standing by themselves, unlawful, but that when taken in connection with the other facts, which had been shown, it appeared that they formed part of an unlawful combination in restraint of trade; [484] that they were therefore contrary to public policy, and could not be enforced. He therefore directed a verdict for the defendant. Counsel for plaintiff duly excepted thereto, and, the verdict and judgment having passed in accordance with the instructions of the court, the case is brought here on writ of error.

Charles W. Baker, for plaintiff in error.

Joseph W. Wilby, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

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SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first of the assignments of error relates to the admission in evidence of the contracts between other parties and the National Mercantile Company of a kind similar to that of the plaintiff with the latter company. But no grounds were stated for the objection to their admission, and for that reason, according to the settled rule, error cannot be assigned upon the action of the court receiving them. 8 Enc. Pl. & Prac. 163, and cases cited. It may not be improper, however, to say that no valid reason occurs to us on which the objection could have been based, seeing that those contracts were immediately connected with the contracts in suit, and, all taken together, constitute the entire transaction in which the parties were engaged. The same observation is applicable to contracts between Cravens and the defendant, the Carter-Crume Company, and the National Mercantile Company, which are copied in the preceding statement of facts. They are to be construed as one.

The second assignment relates to the following ruling of the court at the conclusion of the evidence to the jury:

"Now on the face of the papers themselves, I do not think, and I so charge you, that the contracts—the three of them—are against public policy. But there is evidence tending to show that these contracts were a part of a combination or plan entered into between the manufacturers to the extent of eighty per cent. of the output of the country of wooden dishes, by which they each made a contract with a central company, who was to be the selling company, agreeing to sell all their output to that company at cost, taking shares in that company, and allowing that company to fix the market price for the disposition of the goods after they had been transferred to them for sale, and that these contracts were made for the purpose of maintaining prices, and that for the purpose of maintaining prices further they made contracts to limit the production of machines for the making of wooden dishes."

The record proceeds to state: "Whereupon the counsel for plaintiff excepted to that part of the charge of the court touching the contracts as being against public policy." In explanation, it is proper to say that the above ruling was given in charge to the jury in its preliminary instructions. The jury reported a disagreement. Whereupon the court gave them direct instructions to find for the defendant. The

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latter instruction superseded the former, and opens the whole case.

The third assignment is based upon the exception to the direction of the verdict in favor of the defendant. We cannot, of course, assume, and the court below could not, that any fact was established about which there was room for controversy. All questions of fact [485] material to the issue, about which different opinions could fairly have been formed, were for the jury; and the question for us is whether upon the facts, which were substantially uncontroverted, including those to which the plaintiff himself testified, the verdict which the court directed was the only one which the court would have allowed finally to stand. *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, and 43 U. S. App. 408. From the preceding statement of the case as exhibited upon the trial, the material and uncontroverted facts may be gathered into the following synopsis. But first, we lay out of consideration the typewritten minutes of the proceedings at the meeting of the directors of the National Mercantile Company, on August 28, 1896. We think it might well be that the jury would have been justified in sharing the suspicion of counsel for the plaintiff in regard to their genuineness and veracity. It must be admitted that it is most remarkable that any board of directors of a business establishment should pass such a resolution as is quoted in the foregoing preliminary statement, however much in line it might be with their real purposes.

The parties who were engaged in these transactions, of whom the plaintiff was one, representing 80 per cent. of the total product, undertook to, and did in fact, form a combination for the purpose of restricting the production of wooden dishes throughout the country and keeping up the prices thereof. The articles to which this combination had reference were articles in common use. The plaintiff's contracts were part of the means employed for effecting the common object, and he secured the means of sharing in the profits expected to be gained through the combination. To this end all the factories were expected to be brought under the control of the National Mercantile Company, which was to regulate the prices. The plaintiff testified that it was the purpose

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to close his factory, and not run it at all. He further testified that it was the purpose "to get all the factories in line," in order "to maintain prices." He was guarantied \$9,000 for closing his factory for a year, and the contract included all the dish machines that might come into his possession or control, thus disabling himself from manufacturing, and he obligated himself not to sell any wood dishes to any other person, directly or indirectly, during the continuance of the contract. It is manifest that it was the expectation, and that the parties intended, to get a sufficiently large number of manufacturers into the combination to practically accomplish their purpose. We cannot doubt that such a combination, for such purposes, was opposed to public policy, and therefore unlawful. It is the settled doctrine that one cannot maintain a suit in a court of justice upon a contract entered into for the purpose of promoting such objects. The doctrine was elaborately discussed, upon the principles of the common law, by Judge Taft in a case recently decided by this court. *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. In that case the question was also discussed whether the anti-trust law of 1890 was applicable to the contract then under consideration. But the relation of that act to the common law was involved in the discussion, and much research was bestowed upon the established principles of the latter. The proposition there maintained [486] was that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." It was not doubted, nor, indeed, can it be, that where the direct purpose of the contract in suit is to establish, for increasing their profits, a combination among manufacturers and tradesmen whose function is to prevent competition, and thereby prevent the public from obtaining those articles which are in general use, at the prices at which they could be obtained as the result of fair and untrammelled competition, such contract is unlawful, and cannot be enforced. We have, in the foregoing statement of what we suppose to be the conceded rule, restricted it to the case of "articles in

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general use," in order to indicate a test which is not affected by a feature put forward in some decisions as creating a distinction. We do not commit ourselves upon the question whether such distinction exists or not. The result of the application of the test above formulated to the facts of this case is, manifestly, that the contract here in question cannot be enforced. It is argued by counsel for plaintiff that the contract should be sustained, within the principles stated and approved in *U. S. v. Addyston Pipe & Steel Co.*, upon the theory that the contract upon which the action is based was collateral merely, and did not require the aid of the agreement for combination. But it seems clear to us that this proposition cannot be maintained. This contract was one of the steps in the forbidden organization, and was intended to be one of many by which the objects of the combination were to be accomplished. Seeing what has been the result to the plaintiff, one cannot help feeling that he may have been duped by more artful men. But he was a business man. It is not claimed for him that he was mentally incompetent in any such sense as to absolve him from responsibility for the legal consequences of his acts, and, in such a case as this, the court does not administer equities according to the relative merit of the parties.

We think the court below was right in directing a verdict for the defendant. The judgment is affirmed, with costs.

[1022] SOUTHERN INDIANA EXP. CO. v. UNITED STATES EXP. CO. ET AL.

(Circuit Court of Appeals, Seventh Circuit. March 28, 1899.)

[92 Fed., 1022.]

CARRIERS OF GOODS—DUTIES OF CONNECTING LINES INTER SE.

Appeal from the Circuit Court of the United States for the District of Indiana.

This was a suit in equity by the Southern Indiana Express Company against the United States Express Company and others. A demurrer to the bill was sustained by the circuit

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court, and the bill dismissed (88 Fed. 659), from which order complainant appeals.

F. M. Trissal, for appellant.

Edward Daniels, for appellee.

PER CURIAM. A statement and sufficient discussion of this case will be found in the opinion of the circuit court as reported in *Southern Indiana Exp. Co. v. United States Exp. Co.*, 88 Fed. 659. The decree sustaining the demurrer and dismissing the bill is affirmed.

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[For 88 Fed., 659, see p. 862.]

[978] BLOCK ET AL. v. STANDARD DISTILLING & DISTRIBUTING CO.

(Circuit Court, S. D. Ohio, W. D. July 31, 1899.)

[95 Fed. 978.]

JURISDICTION OF FEDERAL COURT—CITIZENSHIP OF CORPORATION.—SUFFICIENCY OF ALLEGATION.—An allegation that defendant is a corporation "organized under and pursuant to the laws of the state of New Jersey" is an affirmative statement that defendant is a citizen of New Jersey.^a

[979] **EQUITY PLEADING—MULTIFARIOUSNESS—[ANTI-TRUST LAW].**—A bill setting up a claim for damages under the anti-trust law of July 2, 1890, and also asking an injunction restraining defendant from using complainant's trade-mark and trade-name, is multifarious, as joining two distinct causes of action, having no connection with each other, and one of which is triable at law.

UNFAIR COMPETITION—IMITATION OF TRADE-NAME.—A bill which alleges that complainant and defendant are competitors in the same line of business; that defendant has assumed a trade-name similar to, and in imitation of, complainant's trade-name, and the public has been deceived thereby, and great confusion and injury have resulted to complainant's business therefrom; that defendant's incorporators, before it was organized, knew of the existence and character of complainant's business, and the trade-name under which it had for a number of years been conducted; and that defendant has re-

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fused, on complainant's request, to desist from the use of the name,—states a cause of action against defendant for unfair competition.

SAME—TRADE-NAME—FRAUD WHICH WILL DEBAR RELIEF.—The mere fact that complainants, as partners, conduct their business under the name of the "Standard Distilling Company," is not sufficient to show that they represent themselves as a corporation for the purpose of deceiving and defrauding the public, so as to debar them of the right to invoke the protection of a court of equity in the use of such name.

George W. Hardacre and Peck, Shaffer & Peck, for complainants.

J. Shroder and Levy Mayer, for defendant.

THOMPSON, District Judge.

This cause is submitted to the court upon a demurrer to the bill.

The first assignment of the demurrer denies the jurisdiction of the court. It is claimed that the citizenship of the defendant does not appear affirmatively, and that it cannot be inferred. I think it does affirmatively appear that the defendant is a citizen of the state of New Jersey. The statement that it was "organized under and pursuant to the laws of the state of New Jersey" is an affirmative statement that it is a citizen of New Jersey. In *Insurance Co. v. Francis*, 11 Wall. 210, 216, it was alleged that the defendant was a corporation created by the laws of New York, located and doing business in Mississippi under its laws, and the court said:

"This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

The objection to the jurisdiction of the court therefore is not well taken.

The second and third assignments of the demurrer allege that the bill is multifarious, in that it joins two distinct causes of action not necessarily connected or blended, and joins an action at law with a suit in equity. I think these objections to the bill are well taken. The claim for damages

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under the anti-trust law of July 2, 1890, and the facts set forth upon which the complainants ask that the defendant be enjoined from using complainants' trade-mark and trade-name, constitute distinct causes of action, having no connection or relation to each other; and, besides, one is a cause of action triable [1960] at law, while the other is of equitable cognizance. The case attempted to be set forth under the anti-trust law would not justify the allowance of an injunction. So far as the court is advised by the statement of that part of the case, there would be an adequate remedy at law. *Gulf, C. & S. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407, 420; *Blindell v. Hagan*, 54 Fed. 40; *Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696.

The fourth assignment of the demurrer is not insisted upon.

The fifth assignment of the demurrer is upon the ground that the bill does not state facts sufficient to constitute a cause of action.*

* * * * *

[1962] The demurrer will be overruled as to the first and fifth assignments, and sustained as to the second assignment thereof.

[817] LOWRY ET AL. v. TILE, MANTEL & GRATE
ASS'N OF CALIFORNIA ET AL.^b

(Circuit Court, N. D. California. November 13, 1899.)

[98 Fed., 817.]

MISJOINDER OF PARTIES—WAIVER BY APPEARANCE.—Defendants by a general appearance waive the objection of a misjoinder because other defendants are not inhabitants of the district.^c

GENERAL APPEARANCE.—There is a general appearance by a demurrer which does not alone object to the jurisdiction, but goes to the merits of the case.

* The matter omitted has no bearing whatever upon the anti-trust law.

^b See also charge to jury (106 Fed. 38). See vol. 2, p. 53. Judgment affirmed by Circuit Court of Appeals, Ninth Circuit (115 Fed., 27). See vol. 2, p. 112. Case there and subsequently entitled *Montague & Co. v. Lowry*. Affirmed by the Supreme Court (193 U. S., 83). See vol. 2, p. 327.

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ANTITRUST LAW—UNLAWFUL COMBINATION.—A complaint alleging that members of an association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output, and to regulate the prices thereof, with the intent to monopolize the trade and commerce between the other states and California in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the antitrust act of July 2, 1890 (26 Stat. 209).

Action at Law to Recover Damages under the Provisions of Act July 2, 1890 (26 Stat. 209).

Reddy, Campbell & Metson, for plaintiffs.

Linforth & Whitaker, for certain defendants.

MORROW, Circuit Judge.

This is an action at law brought to recover damages alleged to have been sustained by plaintiffs by reason of injury to their business caused by the forming of an association by defendants claimed to be within the prohibitory provisions of the act of congress of July 2, 1890, commonly known as the "Sherman Antitrust Act." The amended complaint alleges: That plaintiffs are co-partners doing business under the firm name of Lowry & Daly, citizens of the state of California, and residents of the Northern district of said state. That the Tile, Mantel & Grate Association of California, and the officers and members thereof, have since the ——— day of January, 1898, and do now, constitute an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, and that they are now, and ever since that day have been, citizens and residents of the city and county of San Francisco, and of the city of Sacramento, and of the city of San José, in the state of California, and of the states set forth hereinafter, and that all said defend- [818] ants have been since that date, and now are, carrying on business in the state of California, and within the jurisdiction of the Northern district thereof. That the defendants hereinafter named are corporations created and existing under the laws of the respective states set opposite to their names: Columbia Encaustic Tile Company, Indiana; United States Encaustic Tile Works, Indiana; Cambridge Tile Manufacturing Company, Kentucky; Pittsburg Tile Company, Penn-

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sylvania; Trent Tile Works, New Jersey; W. W. Montague & Co., California; Bush & Mallett Company, California; Star Encaustic Tile Company, Limited, Pennsylvania; Mangrum & Otter, California; American Tile Company, Ohio; Providential Tile Works, New Jersey; the John Stock Sons, California. That the defendants the Columbia Encaustic Tile Company, Cambridge Tile Manufacturing Company, the American Tile Company, the Pittsburg Tile Company, the Providential Tile Works, and the Star Encaustic Tile Company, Limited, are, and were at all the times mentioned, manufacturers of tiles in the states set forth, and that the defendants Heavener Meir, the John Stock Sons, W. W. Montague & Co., Bush & Mallett, Bennett & Schutte, and Mangrum & Otter are, and ever since January 1, 1898, have been, engaged in the wholesale and retail business of buying and selling tiles, mantels, and grates in the cities of Sacramento, San Jose, and San Francisco, in this state. That the following cities, with the respective populations placed opposite their names, are each situated in the Northern district of California: San Francisco, 290,000 and upwards; Oakland, 40,000 and upwards; Sacramento, 30,000 and upwards; San Jose, 20,000 and upwards. That in said cities there are a great number of dwelling houses, buildings used for business, trade purposes, and manufactories. That new buildings are being constantly erected, and in their construction large quantities of tiles, mantels, and grates are necessarily used for their safe construction and comfortable occupation. That none of the tiles used about buildings or dwellings are made in the state of California, but are manufactured in Eastern states, and imported thence, and such importations into this state amount to the annual value of \$100,000 or thereabouts. That for many years past plaintiffs have been engaged in the wholesale business of dealing in tiles, mantels, and grates, and in conducting this business have purchased these articles from the various corporations defendant, and shipped them to the state of California, and there sold them; that defendants and their associates who are bound by contract with them comprise all the wholesale dealers who handle and import and sell tiles in the cities aforesaid, and, when combined together, can and do abso-

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lutely control the price charged for tiles in said cities, by reason of the distance of these cities from any manufacturers or wholesale dealers other than defendants and those combined with them in other states or foreign countries, who do not belong to the said Tile, Mantel & Grate Association of California. The rates of transportation are prohibitory, so that no tiles have been or can be imported from places other than those in which the corporations and above-named persons have manufactories, stock on hand, or warerooms, and all the grates and tiles made and manufactured within reach of the state of Cali- [819] fornia, where the rate of freight is such that an importation can be made to San Francisco and said other cities at such an amount as to admit of their importation at all, are, and at all times mentioned have been, controlled by the said defendants, or some of them, or those bound by contracts to them. That before the association, combination, and conspiracy hereinafter referred to, defendants were uncombined, and were selling grates, mantels, and tiles on their respective merits, their prices being determined by the law of supply and demand. That in the years 1896 and 1897 there were in San Francisco and the other said cities numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying of them. That defendants, with intent to form a contract, trust, and conspiracy in restraint of trade and commerce between the state of California and the states of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, for the purpose of controlling the output and regulating the price of these commodities, and monopolizing the said trade, combined and conspired to monopolize the grate, tile, and mantel importations and trade and commerce from other states to and with the state of California, to the extent of the tiles, grates, and mantels that could be used in the state of California in the erection and construction of dwellings and buildings, and so conspired to raise the price of these commodities in the California market, and for this purpose on or about the ——— day of January, 1898, formed an organization and adopted a constitution and by-laws, which constitution and by-laws are now in effect. That the said constitution and by-laws provided that no sales and deliveries, or

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contracts for the sale or delivery, or the placing, of tiles, grates, or mantels, will be made by the manufacturers thereof to any person dealing in these commodities, unless such person belong to the said unincorporated association, and shall pay or cause to be paid ——— dollars to that organization, and bind themselves to abide by its constitution and by-laws; that is to say, that no one who is a member of that organization shall sell to, or deal with or deliver to, any person engaged in the business of buying, selling, or placing tiles, grates, or mantels in the cities of San Francisco, Oakland, Sacramento, and San Jose, and other cities in this state, unless such person shall become a member of the said unincorporated organization, and shall agree that in their general business of selling such commodities to the general public they shall sell them at such prices as may be arbitrarily fixed by the said unincorporated association. That, prior to the formation of that organization, plaintiffs were doing a large business in selling tiles, mantels, and grates, and were making an annual profit of about \$5,000. That plaintiffs are unable to join the said organization, because, according to its constitution and by-laws, a unanimous vote of the members of the association is required to elect a member thereof, and certain members of that organization are so antagonistic to plaintiffs, by reason of business differences, that they would not allow them to enter the organization; and further, the rules and regulations of the association require that members must keep constantly in stock goods to the value of \$3,000, and there are times when plaintiffs' stock does not amount to that value. That, if [820] plaintiffs join said association, they would be bound to sell their wares at prices arbitrarily fixed by the association, and not at their fair market value. That said association is illegal and void, by virtue of the act of congress approved July 2, 1890, and by joining it plaintiffs would be guilty of a crime under the said act. That, since the formation of said organization, plaintiffs have been unable to purchase tiles, mantels, or grates from any of the defendants, although they have tendered to the defendants the price of the same. That defendants have refused to deliver any tiles, mantels, or grates to them since the organization of said association.

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That, about the time of the formation of said association, plaintiffs had placed with defendants certain orders for tiles; but these orders were not filled, but were canceled, by the parties with whom they had been placed, for the reason that plaintiffs did not belong to, and would not join, said organization. That, about the time of the formation of the association, plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which canceled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel & Grate Association. That said organization is within the statute of the 51st congress, passed and approved July 2, 1890, known as "Chapter 647, Supplement to the Revised Statutes at Large of the United States." That, by reason of the monopoly of such association, plaintiffs are damaged in the sum of \$10,000. Plaintiffs pray for treble the sum of \$10,000, in accordance with the provisions of the above-named act, and for further equitable relief.

To this amended complaint the defendants W. W. Montague & Co., a corporation; the Bush & Mallett Company, a corporation; Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte; the John Stock Sons, a corporation; Heavener Meir; Mangrum & Otter, a corporation; and the Tile, Mantel & Grate Association,—filed a demurrer. The grounds of this demurrer are: That the amended complaint does not state facts sufficient to constitute a cause of action against defendants, or any of them. That there is a misjoinder of parties defendant, in that the Columbia Encaustic Tile Company, the United States Encaustic Tile Works, the Cambridge Tile Manufacturing Company, the Pittsburg Tile Company, the Trent Tile Company, and the Star Encaustic Tile Company, Limited, are all improperly made and joined as defendants in this action. That the amended complaint is uncertain, (1) in that it does not appear therefrom whether the plaintiffs were at any of the times mentioned in the amended complaint engaged in interstate commerce; (2) in that it cannot be ascertained therefrom whether the acts of defendants complained of interfere with interstate commerce directly, immediately, or at all; (3) in that it cannot be ascertained therefrom with sufficient certainty whether plaintiffs have been damaged in

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the sum of \$10,000 or at all. It does not appear from the record that the foreign corporations joined as defendants have been served with process, and they have made no appearance.

This action is brought under the provisions of an act of congress dated July 2, 1890, and entitled "An act to protect trade and com- [821] merce against unlawful restraints and monopolies." 26 Stat. 209. Section 7 of this act provides:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit including a reasonable attorney's fee."

It is contended by the counsel for defendants that there is a misjoinder of parties defendant in the amended complaint, in that certain corporations organized and doing business in states other than this state have been joined as defendants in this action; such corporations being residents of districts other than this, and not found within this district, so that no service of process can be made upon them, and themselves subjected to the jurisdiction of the court. The allegations of the amended complaint in this respect are as follows:

"All of said defendants have been since that date, and are now, carrying on business in the state of California, and within the jurisdiction of the Northern district thereof."

Defendants' counsel contend that these allegations are not such as to give the court jurisdiction over such defendants as do not reside in this district, and that, as the defendant corporations joined with them reside only in the states in which they have been respectively organized, they can only be sued in their own districts. It is contended by plaintiffs' counsel that the defendants who have demurred are estopped from demurring to the amended complaint upon the ground that some of their co-defendants are being sued in the wrong district, since they have made a general appearance, and by so doing have lost the right to raise the question that there is a misjoinder of parties on these grounds. In the case of *Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, the action was at law, and the court discussed

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the effect of a general appearance by a defendant upon a demurrer by the same defendant based upon jurisdictional grounds. In this case the complaint alleged that the plaintiff was incorporated under the laws of New Jersey, and was a citizen of that state, and that all the defendants were citizens and residents of the state of Indiana. "On June 19, 1890, the defendants Gibney, McElwaine, and Wheeler, by their attorney, entered a general appearance, but Gibney neither pleaded nor answered, and the defendant Bartley never appeared or made any defense. On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the state of Pennsylvania, and not citizens or residents of the state of Indiana, and that therefore the court had no jurisdiction of the case. The plaintiff demurred to this plea as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs." The case was [822] taken to the supreme court upon a writ of error. Mr. Justice Gray delivered the opinion of the court, and in the course of that opinion said, at page 220, 160 U. S., page 273, 16 Sup. Ct., and page 402, 40 L. Ed.:

"In *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 808, 33 L. Ed. 635, this court held that the provision of the act of 1888 as to the district in which a suit between citizens of different states should be brought, required such a suit, in which there was more than one plaintiff or more than one defendant, to be brought in the district in which all the plaintiffs or all the defendants were inhabitants. When there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the nonresident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a nonresident and does not appear, the defendants who do come in may object at the proper stage of the proceedings to being compelled to answer the suit. But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such."

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The judgment of the circuit court was reversed, and the case remanded, with directions to sustain the demurrer to the plea.

A general appearance, therefore, on the part of these defendants, must be deemed a waiver of the objection of a misjoinder because the other defendants are not inhabitants of this district. Counsel contend that they have not made such a general appearance, but have demurred specially on the ground that certain defendants are improperly joined with them. The terms of the demurrer constitute a sufficient answer to this contention.

The grounds of demurrer are not confined to the jurisdiction of the court, but the merits of the case are involved in the objection that the complaint does not state facts sufficient to constitute a cause of action. In the case of *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, the question of special appearance was considered. The action was at law, and was brought in the circuit court of the United States for the Western district of Texas. The petition alleged that the defendant was a corporation duly incorporated under the laws of the state of Kentucky, a citizen of the state of Kentucky, and a resident of El Paso county, in the state of Texas; that defendant "was and is engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio, and the city of San Antonio, all of the state of Texas; that the defendant is now doing business as aforesaid, and has an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup." The plaintiff resided in the county of Red River, which is in the Eastern district of Texas. Defendant, by leave of court, filed a document designed [823] nated as an "answer or demurrer," "for the special purpose, and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court," and demurred and excepted to the petition because, upon the above allegations, "it appears that the suit ought, if maintained at all in the state of Texas, to be brought in the district of the residence of the plain-

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tiff,—that is to say, in the Eastern district of Texas”; and the defendant prayed judgment whether the court had jurisdiction. The court overruled the demurrer. Defendant thereupon answered to the merits, and, judgment being given against it, sued out a writ of error in the United States supreme court on the question of jurisdiction only, under the act of February 25, 1889 (25 Stat. 693, c. 236). Mr. Justice Gray said, at page 206, 146 U. S., page 45, 13 Sup. Ct., and page 944, 36 L. Ed.:

“It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally or by answering to the merits of the action without first objecting to the jurisdiction. *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Railway Co. v. Coo*, 145 U. S. 593, 12 Sup. Ct. 906, 36 L. Ed. 829. But in the present case there was no such waiver. The want of jurisdiction, being apparent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179. The defendant did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed.”

The case of *Railway Co. v. McBride*, 141 U. S. 127, 130, 11 Sup. Ct. 982, 983, 35 L. Ed. 659, cited in *Southern Pac. Co. v. Denton*, *supra*, was also an action at law; and the only question involved was what constituted a general appearance, and its effect upon the jurisdiction of that court. Mr. Justice Brewer, delivering the opinion of the court, said:

“Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds; two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was therefore in the first instance a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives, not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.”

In the case at bar defendants did not file their demurrer “for the special and single purpose of objecting to the jurisdiction,” but for the further purpose of attacking the merits of the case upon the facts as stated in the complaint; and this last issue the court is called upon to decide as a material question in controversy, as will appear hereafter. The

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appearance of defendants demurring in this action must, in view of these authorities, be regarded as a general appearance, and they are therefore prevented from objecting that their co-defendants are improperly joined with them on the ground that they are being sued in the wrong district.

Considering next the ground of demurrer that the amended com- [824] plaint does not state facts sufficient to constitute a cause of action: The statute under which this action is brought (26 Stat. 209) provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the United States, or the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal."

Defendants' counsel rely upon the case of *Anderson v. U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, as supporting their demurrer upon this point. The bill in that case was filed, under the direction of the United States attorney general, by the United States district attorney for the Western district of Missouri. It alleged, among other things, that defendants—

"Have unlawfully entered into a contract, combination, and conspiracy in restraint of trade and commerce among the several states and with foreign nations, in this, to wit: That they have unlawfully agreed, contracted, combined, and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market, at the Kansas City Stock Yards, as aforesaid; that the commission, firm, person, partnership, or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to, and cannot, sell or dispose of said cattle at the Kansas City market, as aforesaid, to any buyer or speculator at the Kansas City Stock Yards, unless said buyer or speculator is a member of the Traders' Live-Stock Exchange, and these defendants, and each of them, unlawfully and oppressively refuse to purchase cattle, or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle, from any speculator of the said Kansas City Stock Yards who is not a member of the said Traders' Live-Stock Exchange; that by and through the unlawful agreement, combination, and conspiracy of

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these defendants, the business and traffic in cattle at the said Kansas City Stock Yards is interfered with, hindered, and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the states and territories aforesaid to the Kansas City Stock Yards."

Mr. Justice Peckham, in the course of the opinion of the court, says:

"The agreement now under discussion differs radically from those of *U. S. v. Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753; *U. S. v. Coal Dealers' Ass'n* (C. C.) 85 Fed. 252; and *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies; being in one case iron pipe for gas, water, sewer, and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration that they form no basis for its decision. This association does not meddle with prices, and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting, or in any manner restraining, interstate commerce, which, if affected at all, can only be in a very [825] indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency, as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders, and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of cattle for sale is therefore furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof."

The allegations of the amended complaint in the present case are that the members of the Tile, Mantel & Grate Association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output and to regulate the prices of these commodities, with the intent of monopolizing the trade and commerce between the other states and California in regard to such commodities, as well as to arbitrarily fix their prices independent of their natural market price. It will be seen, therefore, that the case of *Anderson v. U. S.* cannot be considered as applicable to the case at bar.

The case of *U. S. v. Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753, is more in point. The

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action was brought under the antitrust act against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville, and to change the same from time to time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined 2 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. Owners or operators of mines were not to sell or ship coal to any persons, firms, or corporations in Nashville who were not members of the exchange, and dealers were not to buy coal from any one but a member of the exchange. The court, commenting upon the agreement of this association of coal dealers, said:

"This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely; and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market to a large extent, at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intention of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute; and there is no need of authorities to sustain such view of the case."

In the case of *U. S. v. Coal Dealers' Ass'n* (C. C.) 85 Fed. 252, the bill alleged that defendants comprised all the wholesale dealers handling coal in San Francisco, and that they, together with certain retail dealers, had conspired with intent to monopolize the coal [826] trade and commerce between British Columbia, Washington, and Oregon, to the extent of the coal used for domestic purposes in the city of San Francisco. It was said by this court in that case:

"But the agreement of the importers and wholesale dealers, which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals, by name; and it is this agreement, and what may be accomplished under it by the combination, that is to be considered, and not what it may be doing at any particular time."

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In *U. S. v. Addyston Pipe & Steel Co.*, 54 U. S. App. 723, 29 C. C. A. 141, and 85 Fed. 279, the United States began proceedings in equity against six corporations engaged in the manufacture of cast-iron pipe in localities in Ohio, Kentucky, Alabama, and Tennessee. The bill of complaint charged the defendants with a combination and conspiracy in unlawful restraint of interstate commerce. It appeared that the defendants, who were manufacturers and vendors of cast-iron pipe, entered into a combination to raise the price of pipe for all the states west and south of New York, Pennsylvania, and Virginia, comprising some 36 states in all; and, to carry out this combination, the associated defendants entered into an agreement which provided certain methods of procedure in dealing with the public, whereby competition between themselves was avoided in the territory mentioned. The court, in an able opinion reviewing the whole subject of the law relating to combinations and contracts in restraint of trade, arrived at the conclusion that the association of the defendants was a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood under the act of July 2, 1890. The doctrine of that case is applicable here. The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that such combination has been made with the intent of monopolizing trade and commerce between California and other states, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman act. Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained.

Defendants also demur on the ground of uncertainty, contending that the complaint fails to show that defendants were engaged in interstate commerce, or that their acts directly or immediately interfered with interstate commerce, or in what manner plaintiffs have been damaged, or at all. Upon consideration, however, this ground of demurrer does

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not appear to be well founded. The allegations of the complaint are obviously free from uncertainty in these particulars, and this ground of demurrer must therefore be denied. The demurrer of defendants will therefore be overruled.

[211] ADDYSTON PIPE AND STEEL COMPANY v. UNITED STATES.*

APPEAL FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 51. Argued April 26, 27, 1899.—Decided December 4, 1899.

[175 U. S., 211.]

Under the grant of power to Congress, contained in Section 8 of article I of the Constitution, "to regulate commerce with Foreign Nations and among the several States, and with Indian Tribes," that body may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce.

The provision in the Constitution regarding the liberty of the citizen is to some extent limited by this commerce clause; and the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate, to a greater or less degree, commerce among the States.

Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.

The power to regulate interstate commerce, and to prescribe the rules by which it shall be governed, is vested in Congress, and when that body has enacted a statute such as the act of July 2, 1890, c. 647, entitled "an act to protect trade and commerce against unlawful restraints and monopolies," any agreement or combination which

* Bill asking for a preliminary injunction was dismissed by the Circuit Court for the Eastern District of Tennessee (78 Fed., 712). See p. 631. Decree reversed and defendants perpetually enjoined by the Circuit Court of Appeals, Sixth Circuit (85 Fed., 271). See p. 772. This latter decree was modified and affirmed by the Supreme Court of the United States in the present case (175 U. S., 211).

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directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the national legislature, and violates the statute.

The contracts considered in this case, set forth in the statement of facts and in the opinion of the court, relate to the sale and transportation to other States of specific articles, not incidentally or collaterally, but as a direct and immediate result of the combination entered into by the defendants; and they restrain the manufacturing, purchase, sale or exchange of the manufactured articles among the several States, and enhance their value, and thus come within the provisions of the "act to protect trade and commerce against unlawful restraints and monopolies."

[312] When the direct, immediate and intended effect of a contract or combination among dealers in a commodity is the enhancement of its price, it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made.

The judgment of the court below, which perpetually enjoined the defendants in the court below from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination, is too broad, as it applies equally to commerce which is wholly within a State as well as to that which is interstate or international only.

Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce: nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate.*

[44 L. ed., 136.]^b

[The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce.]

[The constitutional guaranty of liberty of the individual to enter into private contracts does not limit the power of Congress so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.]

*The foregoing syllabus and the abstract of argument copyrighted, 1899, 1900, by The Banks Law Publishing Co.

^bThe following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 44, p. 136. Copyrighted, 1900, by The Lawyers' Co-Operative Publishing Co.

Statement of the Case.

[An agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the anti-trust act of Congress of July 2, 1890, so far as it applies to sales for delivery beyond the state in which the sale is made.]

[A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract.]

[A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of Congress, although the contract may be awarded to some party outside the state as the lowest bidder.]

THIS proceeding was commenced in behalf of the United States, under the so-called anti-trust act of Congress, of July 2, 1890, c. 647, 26 Stat. 209. It was undertaken for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale and transportation of iron pipe at their respective places of business in the States of their residence, from further acting under or carrying on the combination alleged in the petition to have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the States, etc.

The trial court dismissed the petition, 78 Fed. Rep. 712, but upon appeal to the Circuit Court of Appeals the judgment of the court below was reversed with instructions to enter a decree for the United States perpetually enjoining defendants from maintaining the combination in cast-iron pipe as described in the petition, and from doing any business under such combination. 54 U. S. App. 723. The six defendants are The Addyston Pipe and Steel Company of Cincinnati, Ohio; Dennis Long & Company, of Louisville, Kentucky; The Howard-Harrison Iron Company, of Bessemer, Alabama; The Anniston Pipe and Foundry Company, of Anniston, Ala- [213] bama; The South Pittsburg Pipe Works, of South Pittsburg, Tennessee, and The Chattanooga Foundry

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and Pipe Works, of Chattanooga, Tennessee; one company being in the State of Ohio, one in Kentucky, two in Alabama and two in Tennessee.

The following are in substance the facts upon which the judgment of the Circuit Court of Appeals rested, as stated in the record:

It was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves, by which they agreed that there should be no competition between them in any of the States or Territories mentioned in the agreement, (comprising some thirty-six in all,) in regard to the manufacture and sale of cast-iron pipe, and that in obedience to such agreement and combination, and to carry out the same, the defendants had since that time operated their shops and had been selling and shipping the pipe manufactured by them into other States and Territories, under contracts for the manufacture and sale of such pipe with citizens of such other States and Territories. There was to be a "bonus" charged against the manufacture of the pipe, to the extent set forth in the agreements and to be paid as therein stated. The whole agreement was charged to have been entered into in order to enhance the price for the iron pipe dealt in by the defendants.

The petition prayed that all pipe sold and transported from one State to another, under the combination and conspiracy described therein, be forfeited to the petitioner and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants and perpetually enjoining them from operating under the same and from selling said cast-iron pipe in accordance therewith to be transported from one State into another.

The defendants filed a joint and separate demurrer to the petition in so far as it prayed for the confiscation of goods in transit, on the ground that such proceedings under the anti-trust act are not to be had in a court of equity, but in a court of law. In addition to the demurrer, the defendants filed a joint and separate answer, in which they admitted the existence of an association between them for the purpose of avoiding the great losses they would otherwise sustain, due to

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ruinous competition between defendants, but denied that their association was in restraint of trade, state or interstate, or that it was organized to create a monopoly, and denied that it was a violation of the anti-trust act of Congress.

Testimony in the form of affidavits was submitted by petitioner and defendants, and by stipulation it was agreed that the final hearing might be had thereon.

From the minutes of the association, a copy of which was put in evidence by the petitioner, it appeared that prior to December 28, 1894, the Anniston Company, the Howard-Harrison Company, the Chattanooga Company and the South Pittsburg Company had been associated as the Southern Associated Pipe Works. Upon that date the Addyston Company and Dennis Long & Co. were admitted to membership, and the following plan was then adopted:

"First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16" and smaller, shall be divided equally among six shops.

"Second. The bonuses on the next 75,000 tons, 30" and smaller, sizes to be divided among five shops, South Pittsburg not participating.

"Third. The bonuses of the next 40,000 tons, 36" and smaller, sizes to be divided among four shops, Anniston and South Pittsburg not participating.

"Fourth. The bonus on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg and Anniston not participating.

"The above decision is based on the following tonnage of capacity:

South Pittsburg	15,000 tons.
Anniston	30,000 tons.
Chattanooga	40,000 tons.
Bessemer	45,000 tons.
Louisville	45,000 tons.
Cincinnati	45,000 tons.

[215] "When the 220,000 tons have been made and shipped and the bonuses divided as hereafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addyston Pipe and Steel Company, Dennis Long & Co. and the Howard-Harrison Company.

"It was thereupon resolved:

"First. That this agreement shall last for two years from the date of the signing of same, until December 31, 1896.

"Second. On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

"Third. The Addyston Pipe and Steel Company shall handle the

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business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate.

"Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water works in above-named cities.

"Fifth. The Anniston Pipe and Foundry Company shall handle Anniston, Ala., and Atlanta, Ga., furnishing all pipe for gas and water companies in above-named cities.

"Sixth. The Chattanooga Foundry and Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in above-named cities.

"Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the [216] above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo.

"Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and cooperating with them; thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make.

"NOTE.—It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them.

"The following bonuses were adopted for the different States as named below: All railroad or culvert pipe or pipe for any drainage or sewerage purposes on 12" and larger sizes shipped into bonus territory shall pay a bonus of \$1.00 per ton. On all sizes below 12" and shipped into 'bonus territory' for the purposes above named, there shall be a bonus of \$2.00 per ton.

List of Bonuses.

Alabama.....	\$3 00	S. D.....	\$2 00	Ky.....	\$2 00
B'gham, Ala....	2 00	Florida.....	1 00	La.....	3 00
Anniston, Ala..	2 00	Georgia.....	2 00	Miss.....	4 00
Mobile, Ala....	1 00	Atlanta, Ga....	2 00	Mo.....	2 00
Arizona Ter....	3 00	Ga. coast p'ts..	1 00	Montana.....	3 00
California.....	1 00	Idaho.....	2 00	Nebraska.....	3 00
Colorado.....	2 00	Nev.....	3 00	N. Mex.....	3 00
Ind. Ter.....	3 00	Oklahoma.....	3 00	S. C.....	1 00
North C.....	1 00	Wis.....	2 00	Minn.....	2 00
Tenn., east of					
C'land.....	2 00	Texas, interior..	3 00		
Tenn., middle					
and west.....	3 00	Texas coast.....	1 00		
Illinois, except					
Madison and East St. Louis, as previously provided.	2 00				
Wyoming.....	4 00	Wash'ton Ter..	1 00	Utah.....	4 00
Oregon.....	1 00	Michigan.....	1 50	Indiana.....	2 00
Ohio.....	1 50	West Va.....	1 00	Iowa.....	2 00
N. D.....	2 00	Kansas.....	2 00		

All other territory free.

"On motion of Mr. Mewell, the bonuses on all city work as specially reserved shall be \$2.00 per ton."

[217] The States for sale in which bonuses had to be paid into the association were called "pay" territory as distin-

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guished from "free" territory in which defendants were at liberty to make sales without restriction and without paying any bonus.

The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the 1st and 16th of each month he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same and debt credit balance of each company."

The system of bonuses as a means of restricting competition and maintaining prices was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following:

"Whereas, the system now in operation in this association of having a fixed bonus on the several States has not in its operation resulted *in the advancement in the prices of pipe as was anticipated, except in reserved cities*, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: Therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops."

In pursuance of the new plan it was further agreed "that all parties to this association having quotations out shall [218] notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st bonuses shall be fixed by the committee."

At the meeting of December 19, 1895, it was moved and carried that upon all inquiries for prices from "reserved cities" for pipe required during the year of 1896, prices and

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bonuses should be fixed at a regular or called meeting of the principals.

At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into "pay" territory rather than the totals shipped into "pay" and "free" territory.

To illustrate the mode of doing business the following excerpt from the minutes of the meetings of December 20, 1895, February 14, 1896, and March 13, 1896, is given:

"It was moved to sell the 519 pieces of 20" pipe from Omaha, Neb., for \$23.40, delivered. Carried. It was moved that Anniston participate in the bonus and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces of 20" pipe for Omaha was sold to Bessemer at a premium of \$8.

"Moved that 'bonus' on Anniston's Atlanta water works contract be fixed at \$7.10, provided freight is \$1.60 a ton. Carried."

An illustration of the manner in which "reserved" cities were dealt with may be seen in the case of a public letting at St. Louis. On February 4, 1896, the water department of that city let bids for 2800 tons of pipe. St. Louis was "reserved" to the Howard-Harrison Company of Bessemer, Alabama. The price was fixed by the association at \$24 a ton, and the bonus at \$6.50. Before the letting the vice president of this company wrote to the other members of the association under date of January 24, 1896, as follows:

"I write to say that in view of the fact that I do not as yet know what the drayage will be on this pipe, I prefer that if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than \$27 for the pipe, and 2½ [219] cents per pound for the specials. I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders."

The contract was let to the Howard-Harrison Company of Bessemer, at \$24, who allowed the Shickle, Harrison and Howard Company, a pipe company of St. Louis, not in the association, but having the same president as the Howard-Harrison Company of Bessemer, to fill part of the order. The only other bidders were the Addyston Pipe and Steel Company, and Dennis Long & Co., the former bidding \$24.37 and the latter \$24.57. The evidence shows that the Chattanooga foundry could have furnished this pipe, delivered in St. Louis, at from \$17 to \$18, and could have made a profit on it at that price. The record is full of instances of a similar

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kind, in which, after the successful bidder had been fixed by the "auction pool," or had been fixed by the arrangement as to "reserve" cities, the other defendants put in bids at the public letting as high as the selected bidder requested, in order to give the appearance of active competition between defendants.

In January, 1896, after the auction pool had been in operation for more than six months, the Chattanooga Company wrote a letter to its representative in the central committee. The letter is dated January 2, 1896, and is as follows:

"DEAR SIR: Referring to our policy for 1896, in bidding on pipe, we have had this matter under consideration for some time past, and from the information obtained from Mr. Thornton's statement as to the amount of business done last year in pay territory and from estimates that we have made for business, that will come into that territory for 1896, we have been able to determine to what point we could bid on work and take contracts, and if bonus is forced above this point, let it go and take the bonus. We note from your letter of yesterday that you have sized up the situation in its essential points, and it agrees exactly with our ideas on the subject. It is useless to argue that Howard-Harrison Iron Co., [220] Cincinnati, and other shops, who have been bidding bonuses of \$6 or \$8 per ton, can come out and make any money if they continue to bid such bonus. In the case of the Howard-Harrison Iron Co., people on Jacksonville, Fla. The truth of the business is they are losing money at the prices they bid for this work. If they take the contract at \$19 delivered, it will only net \$16 at the shop after they have paid back the bonus of \$4.75; if they should continue to buy all the pipe that goes up to such figures as they have paid for Jacksonville and other points, they would wreck their shop in a few months. However, they of course calculate this bonus will be returned to them on work taken by other shops. We are very much pleased with the bonus that has been paid and we only hope they will keep it up as it is only money in our pockets. As long as there is no money to us let them make the pipe, as we shall continue to do so.

"For the present you will adopt the following basis:

"On 16" and under standard weights, \$14.25 at shop.

"On 18" and 36" standard weights, \$13.

"On 10" and under light weights, \$14.50 to \$14.75 at shop.

"That is, you will bid all over \$13, \$14.25 and \$14.50 on work. If we get work at these prices it will be satisfactory. If the others run bonus above this point let them take it, as it will be more money to us to take the bonus.

"We note Mr. Thornton's report of average premiums from June 1st to December, that the average was \$3.63. The average bonuses that are prevailing to-day are \$7 to \$8. We cannot expect this to continue, and we think your estimate of \$6 ton average bonus is high—as we do not believe the premiums of '96 will average that price, unless there is a decided change for the better in business. We find there were sold and shipped into pay territory from January 1, 1895, to date, including the 40,000 tons of old business that did not pay a bonus, about 188,000 tons, and we think a very conservative estimate of shipments into this territory will amount to fully 200,000 this year; more than that, probably overrun 240,000 tons, from the

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fact that the city of Chicago and several other places that annually use large quantities of pipe were not in the market [221] last year, or last season, from the fact that they were out of funds. On the basis as given you above, if the demand should reach 220,000 tons, which would give us our entire 40,000 tons, provided we did no business, then the association would pay us the average 'bonus,' which might be from \$3.50 to \$5 on our 40,000. If we cannot secure business in 'pay territory' at paying prices, we think we will be able to dispose of our output in 'free territory,' and of course make some profit on that.

"At the prices that Howard-Harrison people paid for Jacksonville, Des Plaines and one or two other points, they are losing from \$2.50 to \$3 per ton, that is, provided 'bonuses' would not be returned to them. Therefore when business goes at a loss, we are willing that other shops make it."

Another letter was written by the same company pending a trouble over a letting at Atlanta. The Anniston Company to whom Atlanta had been "reserved" made its bid so high (\$24) that a Philadelphia pipe firm, R. D. Wood & Co., had been able to underbid the Anniston Company in spite of difference in freights. All the bids had been rejected as too high, and upon a second letting Anniston's bid was \$1.25 a ton less, and the job was awarded to it. The charge was then made by Atlanta persons that there was a "trust" or "combine." This was vigorously denied. The letter of the Chattanooga Company evoked by this difficulty was dated February 25, 1896, and reads as follows:

"GENTLEMEN: We are in receipt of a carbon copy of your favor of the 24th instant to F. B. Nichols, V. P., in reference to Atlanta, Ga. We certainly regret that the matter has assumed its present shape, and that R. D. Wood & Company should make a lower bid by one dollar a ton than the southern shops. You know we have always been opposed to special customers and 'reserved cities,' we do not think that it is the right principle and we believe if the present association continues, that all special customers and 'reserved cities' should be wiped out; there is no good reason why we should be allowed to handle New Orleans, you Atlanta, Howard-Har- [222] rison Iron Co., St. Louis, or South Pittsburg, Omaha. We are not in the business to award special privileges to any foundry, and we believe that the result would be more benefit to all concerned if all business was made competitive. It is hardly right, and we believe if you will think over the matter carefully you will concede it, for us to be put into a position of being unable to make prices or furnish pipe for the city of Atlanta, when we have always heretofore had a large share of their trade. We cannot explain our position to the Atlanta people and we consider it is detrimental to our business, and think no combination should have the power to force us into such a position. The same argument will apply with you as to New Orleans, St. Louis and other places. We think this matter should be considered seriously and some action taken that will result in reestablishing ourselves (I mean the four southern shops) in the confidence of the Atlanta people. Wistar, R. D. Wood & Company's man, has no doubt told them all about

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our association, or as much as he could guess, and has worked up a very bitter feeling against us. The very fact that you have been protected and have had all their business for the past two years is proof to them that such a 'combination' exists, and they state that if they find out positively that we are working together, they will never receive a bid from any one of us again. We cannot afford to leave these people under that impression, and something ought to be done that would disprove Mr. Wistar's statement to them. We believe that all business ought to be competitive. The fact that certain shops have certain cities 'reserved' is all based upon mere sentiment, and no good reason exists why it should be so. We believe that, as a general thing, we have had our prices entirely too high, and especially do we believe this has been the case as to prices in 'reserved' cities. The prices made at St. Louis and Atlanta are entirely out of all reason, and the result has been and always will be, when high prices are named, to create a bad feeling and an agitation against the 'combination.' There is no reason why Atlanta, New Orleans, St. Louis or Omaha should be made to pay higher prices for their pipe than other places near [223] them, who do not use anything like the amount of pipe and whose trade is not as desirable for many other reasons. There is no sentiment existing with us in reference to Atlanta, as we would as soon sell our pipe anywhere else, only as stated above, it is wrong in principle that we should be forced to give up Atlanta or any other point for no good reason that we know of."

It appears quite clearly from the prices at which the Chattanooga and the South Pittsburg Companies offered pipe in "free" territory that any price which would net them from \$13 to \$15 a ton at their foundries would give them a profit. Pipe was freely offered by the defendants in "free" territory more than five hundred miles from their foundries at less prices than their representative boards fixed prices for jobs let in cities in "pay" territory nearer to defendants' foundries by three hundred miles or more.

The defendants adduced many affidavits of a formal type, chiefly from persons who had been buying pipe from defendants and other companies, who testified in a general way that the prices at which the pipe had been offered by defendants all over the country had been reasonable, but in not one of the affidavits was any attempt made to give figures as to cost of production and freight, and in not a single case were the specific instances shown by the evidence for the petitioner disputed.

There was some evidence as to the capacity of the defendants' mills. The division of bonuses was based on an aggregate yearly output of 220,000 tons, but there are averments in the answer that indicate that this was not a statement of the actual limit of capacity, but was only taken as a standard of restricted output upon which to calculate an equitable

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division of bonuses. Nowhere in the large mass of affidavits is there any statement of the *per diem* capacity of the defendants' mills. Taking their aggregate capacity, however, as 220,000 tons, that of the other mills in the "pay" territory was 170,500 tons, and that of the mills in the "free" territory was 348,000 tons, according to the affidavit of the chief officer of one of the defendants. Of the non-association mills in the [224] "pay" territory one was at Pueblo, Colorado, another was in the state penitentiary at Waco, Texas, and a third in Oregon. Their aggregate annual capacity was 45,500 tons. Another non-association mill was the Shickle, Howard-Harrison mill of St. Louis, Missouri, with a capacity of 12,000 tons. John W. Harrison, who was president of this company, was also president of the Howard-Harrison mill at Bessemer, Alabama, which was a member of the association, and it appears that an order taken by the Bessemer mill at St. Louis was partly filled by the St. Louis mill. The other mills in the "pay" territory were one at Columbus, Ohio, with an annual capacity of 30,000 tons, one at Cleveland, Ohio, of 60,000 tons, one at New Comerstown, in northeastern Ohio, of 8000 tons, and one at Detroit, Michigan, of 15,000 tons, and their aggregate annual capacity was 113,000 tons. In the "free" territory there was one mill in eastern Virginia with an annual capacity of 16,000 tons, four mills in eastern Pennsylvania with a capacity of 87,000 tons, three mills in New Jersey with a capacity of 210,000 tons, and two mills at New York, one at Utica and another at Buffalo, with an aggregate capacity of 35,000 tons.

The evidence was scanty as to rates of freight upon iron pipes, but enough appeared to show that the advantage in freight rates which the defendants had over the large pipe foundries in New York, eastern Pennsylvania and New Jersey in bidding on contracts to deliver pipe in nearly all of the "pay" territory varied from \$2.00 to \$6.00 a ton, according to the location.

The defendants filed the affidavits of their managing officers, in which they stated generally that the object of their association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between defendants which would have carried prices far below a reasonable point;

Argument for Appellants.

that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible and more than his due proportion; that the prices fixed by the association were always reasonable and [225] were always fixed, as they must have been, with reference to the very active competition of other pipe manufacturers for every job; that the reason why they sold pipe at so much cheaper rates in the "free" territory than in the "pay" territory was because they were willing to sell at a loss to keep their mills going rather than to stop them; that the prices at a city like St. Louis, in which the specifications were detailed and precise, were higher because pipe had to be made especially for the job and they could not use stock on hand.

Mr. Frank Spurlock (with whom was *Mr. Foster V. Brown* on his brief) and *Mr. John W. Warrington* for appellants, cited in their briefs: *Printing and Numerical Reg. Co. v. Sampson*, L. R. 19 Eq. 462, 465; *Rousillon v. Rousillon*, 14 Ch. Div. 351, 365; *National Benefit Co. v. Union Hospital Co.*, 45 Minnesota, 272; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 68; *Oakdale Manufacturing Co. v. Garst*, 18 R. I. 484; *Tode v. Gross*, 127 N. Y. 480; *Shrainka v. Scharringhausen*, 8 Mo. App. 522; *Beal v. Chase*, 31 Michigan, 490; *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553; *S. C.*, 138 U. S. 617; *Kellogg v. Larkin*, 3 Pinney, (Wisconsin,) 123; *Dueber Watch Case Manufacturing Co. v. E. Howard Watch & Clock Co.*, 35 U. S. App. 16; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 N. Y. 519; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; *United States v. Trans Missouri Freight Ass'n*, 166 U. S. 290; *Eastman v. Clark*, 53 N. H. 276; *Mayrant v. Marston*, 67 Alabama, 453; *Fay v. Davidson*, 13 Minnesota, 523; *Wickens v. Evans*, 3 Younge & Jervis, 318; *Nat. Benefit Co. v. Union Hospital Co.*, 45 Minnesota, 272; *Hubbard v. Miller*, 27 Michigan, 15; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Emert v. Missouri*, 156 U. S. 296; *Asher*

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v. Texas, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Brennan v. Titusville*, 153 U. S. 289, 307; *Hopkins v. United States*, 171 U. S. 578; *Bohn Manufacturing Co. v. Hollis*, 54 Minnesota, 223; *United States v. E. C. Knight Co.*, 156 U. S. 1; *Brown v. Maryland*, 12 Wheat. 419; *State [226] Freight Tax case*, 15 Wallace, 232; *Coe v. Errol*, 116 U. S. 517; *Kidd v. Pearson*, 128 U. S. 1; *Welton v. Missouri*, 91 U. S. 275; *In re Greene*, 52 Fed. Rep. 104; *Paul v. Virginia*, 8 Wall. 168; *Civil Rights cases*, 109 U. S. 3; *In re Debs*, 158 U. S. 564; *Scudder v. Union Nat'l Bank*, 91 U. S. 406; *United States v. De Witt*, 9 Wall. 41; *License Tax cases*, 5 Wall. 462; *In re Rahrer*, 140 U. S. 545; *Patterson v. Kentucky*, 97 U. S. 501; *Barron v. Baltimore*, 7 Pet. 243; *Mopongahela Nav. Co. v. United States*, 148 U. S. 312; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *United States v. Joint Traffic Association*, 171 U. S. 505; *Anderson v. United States*, 171 U. S. 604; *N. Y., Lake Erie & Western Railroad v. Pennsylvania*, 158 U. S. 431; *Pittsburgh & Southern Coal Co. v. Bates*, 156 U. S. 577; *Adams Express Co. v. Ohio*, 165 U. S. 194; *S. C.*, 166 U. S. 185; *Brennan v. Titusville*, 153 U. S. 289; *Pettibone v. United States*, 148 U. S. 197; *Powell v. Pennsylvania*, 127 U. S. 678; *Railroad Co. v. Richmond*, 19 Wall. 584; *Munn v. Illinois*, 94 U. S. 113; *Dow v. Beidelman*, 125 U. S. 680; *Budd v. New York*, 143 U. S. 517; *Packet Co. v. Keokuk*, 95 U. S. 80; *Allgeyer v. Louisiana*, 165 U. S. 578; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Boyd v. United States*, 116 U. S. 616.

Mr. Solicitor General for the United States.

MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

The foregoing statement, which has been mainly taken from that preceding the opinion of Circuit Judge Taft, delivered in this case in the Circuit Court of Appeals, comprises, as we think, all that is essential to the discussion of the questions arising in this case, and we believe the statement to be fully borne out as to the facts, by the evidence set forth in the record.

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Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the appellants at the threshold of the [227] inquiry that by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by state legislation or by means of regulations made under the authority of the State by some political subdivision thereof, including also Congressional power over common carriers, elevator, gas and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen at least upon commercial subjects, and to that extent the guaranty operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, and *Brown v. Maryland*, 12 Wheat. 419, and from the opinions of other justices of this court in the cases of *The State Freight Tax*, 15 Wall. 232, 275; *Railroad Company v. Richmond*, 19 Wall. 584, 589; *Welton v. Missouri*, 91 U. S. 275, 280; *Mobile County v. Kimball*, 102 U. S. 691, 697, and *Kidd v. Pearson*, 128 U. S. 1, 21, all of which are to the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation. The further remark is quoted from *Railroad Company v. Richmond*, *supra*, that the power of Congress to regulate commerce was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. It is added

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that the proof herein shows that the contract in this case was not so designed.

It is undoubtedly true that among the reasons, if not the [228] strongest reason, for placing the power in Congress to regulate interstate commerce, was that which is stated in the extracts from the opinions of the court in the cases above cited.

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

In *Gibbons v. Ogden*, (*supra*.) the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty or property without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the more liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer v. Louisiana*, 165 U. S. 578; *United States v. Joint Traffic*

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Association, 171 U. S. 505, 572. But it has never been, and in our opinion ought not to be, held that the word included [229] the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States.

We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes or that it was intended to include a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts.

While unfriendly or discriminating legislation of the several States may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce.

If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had

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enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon [230] interstate commerce as would the legislation of a single State of the same character.

In the *Debs case*, 158 U. S. 564, it was said by Mr. Justice Brewer, speaking for the court: "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearing upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

What sound reason can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.

The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such contracts might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract.

The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which from its general and great importance has been granted to Congress as the proper representative of the nation at large. Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even

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[231] though such regulation is effected by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the State itself. In both cases it is an attempt to regulate a subject which, for the purpose of regulation, has been, with some exceptions, such as are stated in *Mobile County v. Kimball*, 102 U. S. 691, 697; *Morgan v. Louisiana*, 118 U. S. 455, 465; *Bowman v. Chicago & N. W. Railway*, 125 U. S. 465; *Western Union Telegraph Co. v. James*, 162 U. S. 650, 655, exclusively granted to Congress; and it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other.

It is, indeed, urged that to include private contracts of this description within the grant of this power to Congress is to take from the States their own power over the subject, and to interfere with the liberty of the individual in a manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case.

If it should be held that Congress has no power and the state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different States might and probably would differ in regard to the matter, according to what each State might regard as its own particular interest. One State [232] might condemn all kinds of contracts of the class described, while another might permit the making of all of

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them, while still another might permit some and prohibit others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individuals or corporations of such extent and magnitude as to seriously affect commerce among the States. These consequences would seemingly necessarily follow if it were decided that the state legislatures had control over the subject to the extent mentioned.

It is true, so far as we are informed, that no state legislature has heretofore authorized by affirmative legislation the making of contracts upon the matter of interstate commerce of the nature now under discussion. Nor has it, in terms, condemned them. The reason why no state legislation upon the subject has been enacted has probably been because it was supposed to be a subject over which state legislatures had no jurisdiction. If it should be decided that they have, then the course of legislation of the different States on this subject would probably be as varied as we have already indicated.

On the other hand, if it be true that in no event could a state legislature enact a law affirmatively authorizing such contracts, (even if Congress had no jurisdiction over the subject,) because in so doing it would to a greater or less extent itself thereby, though indirectly, regulate interstate commerce, then the question whether such contracts were legal without legislative sanction would depend upon the decisions of the various state courts having jurisdiction in the cases, and in that event, as the same question might arise in different States, there would be great probability of inconsistent and contradictory decisions among the courts of the different States, and that, too, upon questions of contracts amounting to the regulation of interstate commerce. It is true that under our system of government there are numerous subjects over which the States have exclusive jurisdiction, resulting in the enactment [233] of different laws upon the same subject in various States, and also in varying and inconsistent judicial judgments in the different States upon the same subject. That condition has never been regarded

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as an end in itself desirable. It undoubtedly results in some confusion as to the law applicable to the particular case, and in many instances thereby increases the cost and renders doubtful the result of the litigation arising under such circumstances. They are results and the necessary accompaniment of the division of sovereignty between the States on the one hand and the Federal Government on the other, and yet the enormous and inestimable benefits arising from the existence of separate, independent and sovereign States have completely submerged the comparatively minor evils of inconsistent judgments and different laws upon many of the subjects over which the States have exclusive jurisdiction. But upon the matter of interstate and foreign commerce and the proper regulation thereof, the subject being not alone national but international in its character, the great importance of having but one source for the law which regulates that commerce throughout the length and breadth of the land cannot in our opinion be overestimated. Each State in that event would have complete jurisdiction over the commerce which was wholly within its own borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts of the nature we have been discussing.

The remark in *Railroad Company v. Richmond*, (*supra*,) that it was never intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce, when read in connection with the facts stated in the report, is entirely sound. It therein appears that a contract had been made between the parties, as to the erection of an elevator and the business to be done by it, which contract was valid when made. Subsequently Congress passed acts relating to the construction of bridges over rivers and streams and authorizing railroads to carry passengers on their way from one State to another. The railroad company becoming tired of its contract with the elevator company, desired to take advantage of this legislation and contended that under it, the contract which it had theretofore made with the elevator company became void as

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an obstacle to or a regulation of commerce. The court held that contracts which were valid when made continue valid and capable of enforcement, so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the condition of business which originally led to their creating. It was then added that it never was intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce.

There is no intimation in this remark that Congress has no power to legislate regarding those contracts which do directly regulate and restrain interstate commerce. The inference is quite the reverse, and it is plain that the case assumes if private contracts when entered into do directly interfere with and regulate interstate commerce, Congress had power to condemn them. If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed.

Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several [235] States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants. We there-

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fore think the appellants have failed in their contention upon this branch of subject.

We are thus brought to the question whether the contract or combination proved in this case is one which is either a direct restraint or a regulation of commerce among the several States or with foreign nations contrary to the act of Congress. It is objected on the part of the appellants that even if it affected interstate commerce the contract or combination was only a reasonable restraint upon a ruinous competition among themselves, and was formed only for the purpose of protecting the parties thereto in securing prices for their product that were fair and reasonable to themselves and the public. It is further objected that the agreement does not come within the act because it is not one which amounts to a regulation of interstate commerce, as it has no direct bearing upon or relation to that commerce, but that on the contrary the case herein involves the same principles which were under consideration in *United States v. E. C. Knight Company*, 156 U. S. 1, and, in accordance with that decision, the bill should be dismissed.

Referring to the first of these objections to the maintenance of this proceeding, we are of opinion that the agreement or combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them. Even if the objection thus set up would, if well founded in fact, constitute a defence, we agree with the Circuit Court of Appeals in its statement of the special facts upon this branch of the case and with its opinion thereon as set forth by Circuit Judge Taft, as follows:

"The defendants being manufacturers and vendors of cast-iron pipe entered into a combination to raise the prices for pipe for all the States west and south of New York, Pennsylvania [236] and Virginia, constituting considerably more than three quarters of the territory of the United States, and significantly called by the associates 'pay' territory. Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the 'pay' territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado and Oregon, so far removed from that part of the 'pay' territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in 'pay' territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible

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annual capacity was about one half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the 'pay' territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga and South Pittsburg, and Anniston and Bessemer were grouped much nearer to the centre of the 'pay' territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in 'pay' territory, the defendants, by controlling two thirds of the output in 'pay' territory, were practically able to fix prices. The competition of the Ohio and Michigan mills of course somewhat affected their power in this respect in the northern part of the 'pay' territory, but the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limits already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from Atlantic seaboard added, this is true, but within that limit they could fix prices as they chose. The most cogent evidence that they had this power is the fact everywhere apparent in the record that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact.

"The defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee and by allowing the highest bidder at the secret 'auction pool' to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In *United States v. E. C. Knight Company*, 156 U. S. 1, 16, Chief Justice Fuller, in speaking for the court, said: 'Again all the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'

"It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in 'pay' territory were reasonable. A great many affidavits of purchasers of pipe in 'pay' territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that in their [238] opinion the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency

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was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But if it were important we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed \$15 a ton. It could have been delivered at Atlanta at \$17 to \$18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was \$24.25. The same thing was true all through 'pay' territory to a greater or less degree, and especially at 'reserved' cities."

The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed.

We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of *United States v. E. C. Knight Company*, *supra*. It was there held that although the American Sugar Refining Company, by means of the combination referred to, had obtained a practical monopoly of the business of manufacturing sugar, yet the act of Congress did not touch the case, because the combination only related to manufacture and not to commerce among the States or with foreign nations. The plain distinction between manufacture and commerce was pointed out, and it was observed that a contract or combination which directly related to manufacture only was not brought within the purview of the act, although as an indirect and incidental result of such combination commerce among the States might be thereafter somewhat affected. Mr. Chief Justice Fuller, in delivering the opinion of the court, spoke of the distinction between the two subjects, and said:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessity of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the General Government, in the exercise of the power to regulate commerce, may repress such monopoly directly and set aside the instruments which have created it.

"Doubtless, the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into

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play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it.

"It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the General Government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

"There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we [240] have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The direct purpose of the combination in the *Knight case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State, was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the States as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce.

We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

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While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of arti- [241] cles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?

If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced, (as it naturally would be,) the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another State, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute?

As has frequently been said, interstate commerce consists of

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intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-203; *Kidd v. Pearson*, 128 U. S. 1, 20. If, therefore, an agreement or combination directly restrains not aione the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute. The power to regulate [242] such commerce, that is, the power to prescribe the rules by which it shall be governed is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the statute. We think it plain that this contract or combination effects that result.

The defendants allege, and it is true, that their business is not like a factory manufacturing an article of a certain kind for which there is at all times a demand, and which is manufactured without any regard to a particular sale or for a particular customer. In this respect as in many others the business differs radically from the sugar refiners. The business of defendants is carried on by obtaining particular contracts for the sale, transportation and delivery of iron pipe of a certain description, quality and strength, differing in different contracts as the intended use may differ. These contracts are, generally speaking, obtained at a public letting, at which there are many competitors, and the contract bid for includes, in its terms, the sale of the pipe and its delivery at the place desired, the cost of transportation being included in the purchase price of the pipe. The contract is one for the sale and delivery of a certain kind of pipe, and it is not generally essential to its performance that it should be manufactured for that particular contract, although sometimes it may be.

If the successful bidder had on hand iron pipe of the kind

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specified, or if he could procure it by purchase, he could in most cases deliver such pipe in fulfilment of his contract just the same as if he manufactured the pipe subsequently to the making of the contract and for the specific purpose of its performance. It is the sale and delivery, of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the State makes the transaction a part of interstate commerce. Municipal corporations and gas, railroad and water companies [243] are among the chief customers for the pipe, and when they desire the article they give notice of the kind and quality, size, strength and purpose for which the pipe is desired, and announce that they will receive proposals for furnishing the same at the place indicated by them. Into this contest (and irrespective of the reserved cities) the defendants enter, not in truth as competitors, but under an agreement or combination among themselves which eliminates all competition between them for the contract, and permits one of their number to make his own bid and requires the others to bid over him. In certain sections of the country the defendants would have, by reason of their situation, such an advantage over all other competitors that there would practically be no chance for any other than one of their number to obtain the contract, unless the price bid was so exorbitant as to give others not so favorably situated an opportunity to snatch it from their hands. Under these circumstances, the agreement or combination of the defendants, entered into for that purpose and to directly obtain that desired result, would inevitably and necessarily give to the defendant, who was agreed upon among themselves to make the lowest bid, the contract desired and at a higher price than otherwise would have been obtained, and all the other parties to the combination would, by virtue of its terms, be restricted from an attempt to obtain the contract.

The combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say

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they did not intend to regulate or affect interstate commerce, They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.

The cases of *Hopkins v. United States*, 171 U. S. 578, and *Anderson v. United States*, 171 U. S. 604, are not relevant. In the *Hopkins* case it was held that the business of the members of the Kansas City Live Stock Exchange was not interstate commerce, and hence the act of Congress did not affect them; while in the *Anderson* case it was held that whether the members of the Traders' Live Stock Exchange were or were not engaged in the business of interstate commerce, was immaterial, as the agreement proved was not in restraint of trade, and did not regulate such commerce. It was said that when it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce were only indirect and incidental. The agreement involved in that case was held to be of such a character. The case we have here is of an entirely different nature, and is not covered or affected by the decisions cited.

It is also urged that as but one contract would be awarded for the work proposed at any place, and therefore only one person would secure it by virtue of being the lowest bidder, the selection by defendants of one of their number to make the lowest bid as among themselves could not operate as any restraint of trade; that the combination or agreement operated only to make a selection of that one who should have the contract by being the lowest bidder, and it did not in the most remote degree itself limit the number or extent of contracts, and therefore could not operate to restrain interstate trade. This takes no heed of the purpose and effect of the combination to restrain the action of the parties to it so that there shall be no competition among them to obtain the contract for themselves.

We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers

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in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the [245] trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.

If iron pipe cost one hundred dollars a ton instead of the prices which the record shows were paid for it, no one, we think, would contend that the trade in it would amount to as much as if the lower prices prevailed. The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article. It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let the better for the combination. It was formed not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. And when by reason of the combination a particular contract may have been obtained for one of the parties thereto, but at a higher price than would otherwise have been paid, the charge that the combination was one in restraint of trade is not answered by the statement that the particular contract was in truth obtained and not prevented. The parties to such a combination might realize more profit by the higher prices they would secure than they could earn by doing more work at a much less price. The question is as to the effect of such combination upon the trade in the article, and if that effect be to

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destroy competition and thus advance the price, the combination is one in restraint of trade.

Decisions regarding the validity of taxation by or under state authority, involving sometimes the question of the point of time that an article intended for transportation beyond the [246] State ceases to be governed exclusively by the domestic law and begins to be governed and protected by the national law of commercial regulation, are not of very close application here. The commodity may not have commenced its journey and so may still be completely within the jurisdiction of the State for purposes of state taxation, and yet at that same time the commodity may have been sold for delivery in another State. Any combination among dealers in that kind of commodity, which in its direct and immediate effect, forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would in our opinion be one in restraint of trade or commerce among the States, even though the article to be transported and delivered in another State were still taxable at its place of manufacture.

It is said that a particular business must be distinguished from its mere subjects, and from the instruments by which the business is carried on; that in most cases of a large manufacturing company it could only be carried on by shipping products from one State to another, and that the business of such an establishment would be related to interstate commerce only incidentally and indirectly. This proposition we are not called upon to deny. It is not, however, relevant. Where the contract is for the sale of the article and for its delivery in another State, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture.

It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of

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the same nature as the manufacturing of refined sugar in the *Knight case*—that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at [247] some time to sell, and possibly to sell in another State; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided.

The views above expressed lead generally to an affirmation of the judgment of the Court of Appeals. In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate.

In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it.

The fact that the proposal called for the delivery of pipe in the same State where some of the defendants resided and carried on their business would be sufficient, so far as the act

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of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract [248] for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside the State as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the Federal power derived from the commerce clause in the Constitution.

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character. As thus modified, the decree is

Affirmed.

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